The Practical Use of Motions to Structure a Complex Civil Case

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The proper use of written motions before and at the beginning of the trial of a complex civil action[1] can reduce the risk of an adverse verdict, educate the court to the weaknesses of one's opponents, and simplify and shorten the trial. This Article will demonstrate how written motions can be used to structure a case so that both the risk of exposure and the chance of surprise at trial are minimized. Part I will discuss the utility of written pretrial motions, while Part II will focus upon the advantages of motions filed immediately before trial and during the first few days of a lengthy trial.

The emphasis of this Article is upon the complex civil case that will, at least potentially, be tried to a jury. It is organized so that the issues are discussed in the sequence they would be presented to lead counsel, namely: (1) venue (Where should the action be tried?); (2) the proper parties to the action (Who should be joined as a party to the action and which parties should be dismissed?); (3) the more beneficial trier of fact (Who should hear and decide the facts, the court or a jury?); (4) the most advantageous point(s) to emphasize (Which claims, issues, or defenses are to be decided, and in what order?); (5) proof at trial (What evidence should be admitted?); and (6) tactics for presenting the case to the jury (How should one educate the jury to the case?).[2]

What is the purpose and effect of motions directed to these issues? A ready test for determining which issues or proof should be the subject of a pretrial motion is to identify the subjects or evidence that will be most harmful to one's case or that will be most difficult and expensive to contradict, disprove, or nullify at trial. Counsel should try to eviscerate his opponent's case by removing or weakening his opponent's strongest arguments before these points are ever presented to the jury. The purpose of a motion, therefore, is to structure the case in a form advantageous to

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1. For purposes of this article, a complex civil action is simply one in which large amounts of money are at stake. Examples include large contract or breach of warranty cases, antitrust actions, securities fraud actions, civil conspiracy cases, and cases involving multiple parties and claims. A complex civil action can be in either federal or state court, and is often tried to a jury, or at least prepared on the assumption that it will be tried to a jury. For a brief description of the commercial "big case," see Gilliam, *A Pragmatic Approach to Complex Litigation*, 3 U. DAY. L. REV. 101, 101 (1978), and 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION, pt. 2, ¶ 0.10, at 5 (2d ed. 1979).

2. Discovery motions are not included in the scope of this Article. Motions to compel discovery pursuant to FED. R. CIV. P. 37(a) and motions for a protective order under FED. R. CIV. P. 26(c) are examples. Although these and similar motions can be significant, they are widely known, routinely used, and discussed in numerous scholarly publications. *See, e.g.*, Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978). The same statements cannot be made about the motions discussed in this Article.

the moving party by defining and limiting issues, discovery, and proof, and its effect is to increase the likelihood of a favorable settlement (by shaping a poor case for one's opponent to try) or at least to make the trial shorter, simpler, and cheaper to conduct..

Motions directed at eliminating or structuring issues in the case should focus the court's attention on the following factors:[3]

(1) How is the jury to be instructed to handle the issue? If the jury instructions for an issue would be unduly complex or confusing to a jury, the court is more likely to grant a motion to limit, define, resolve, or sever the issue.

(2) Does the issue necessitate presentation of proof different from that required by other issues to be tried?[4]

(3) Does resolution of this issue involve complex evidentiary questions not presented by other issues to be tried? For example, conspiracy claims in a case will probably involve the co-conspirator exception to the hearsay rule, with all its intricacies.[5] Similarly, complex expert testimony may be necessary to prove some issues but not others—for example, experts' testimony concerning damages.

(4) Is an issue relevant to only one form of relief requested by a party? Trial of some issues may be separated or deferred when those issues are relevant only to certain types of relief sought by the plaintiff (*e.g.*, equitable relief such as reformation, rescission, or injunction).

By directing the trial judge's attention to issues of the type mentioned above, counsel is able to demonstrate that he recognizes the court's burden of maintaining control over the proceedings, while, at the same time, directing the court's efforts in a direction most likely to produce advantageous results for his client.

I. PRELIMINARY PRETRIAL MOTIONS

A. *Venue*

The plaintiff who files a complex civil action will have the first chance to choose the forum in which the case will be tried. Obviously, the choice will not be dictated by considerations of convenience and expense to the defendant. More importantly, the plaintiff's decision may be based on factors that could determine the outcome of the lawsuit—for example, the

3. All written motions should be supported by sworn testimony to adequately preserve the record. Thus, a motion should be accompanied by an affidavit of the moving party, sworn answers to the interrogatories of either side that show relevant facts that support the motion, or excerpts of deposition testimony relating to the issue. Counsel should avoid the use of his own affidavit except as to the facts underlying discovery disputes or similar questions. *See* Garvey, *The Attorney's Affidavit in Litigation Proceedings*, 31 STAN. L. REV. 191 (1979); and King v. National Indus. Inc., 512 F.2d 29, 33-34 (6th Cir. 1975) (holding that an affidavit of the plaintiff's attorney is insufficient to rebut an affidavit supporting the defendant's motion for summary judgment).

4. For an example of these considerations in conspiracy cases, see the text accompanying note 71 *infra*.

5. *See* the text accompanying notes 146-52 *infra*.

applicable statute of limitations in a suit brought under Rule 10b-5 of the federal securities laws.[6] The defendant need not, however, resign himself to trying the action in the forum selected by the plaintiff. The federal antitrust laws[7] and the federal securities laws[8] both contain provisions that permit an action to be venued in any one of numerous jurisdictions, and there are several federal statutes (which the plaintiff may have overlooked) that require an action to be brought in a specific forum or one of a limited number of forums.[9]

Motions to transfer a case under 28 U.S.C. § 1404 are granted with increasing frequency.[10] A motion to transfer should be made in the alternative, seeking first to dismiss the action for improper venue and second, in case the court refuses to dismiss, to transfer the action to another forum. The alternative form of motion is desirable since the court can, if it wishes, avoid the harsh action of dismissal, and will, therefore, be more likely to grant the relief requested.

The transfer of an action can be beneficial to the moving party in several ways. First, the choice of forum can, in some instances, be outcome determinative.[11] The importance of selecting the proper courts in a rule

6. 17 C.F.R. § 240.10b-5 (1978). Although securities actions are governed by federal law, the period in which an action must be brought is a matter of state law.

Courts have reached different results in determining which statute of limitations to apply. The Sixth Circuit, for example, has specifically rejected the two year statute of limitations provided in the Ohio Blue Sky law, choosing to apply Ohio's four year fraud statute of limitations for actions brought in a federal district court in Ohio. Gaudin v. KDI Corp., 576 F.2d 708, 711-12 (6th Cir. 1978); Nickels v. Koehler Management Corp., 541 F.2d 611 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). On the other hand, the Tenth Circuit has choosen a two year statute of limitations for actions in which Oklahoma law governs. Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168, 171 (10th Cir. 1974). *See generally* Jacobs, *Affirmative Defenses to Securities Exchange Act Rule 10b-5 Actions*, 61 CORNELL L. REV. 857, 860-69 (1976).

Some circuits also have more stringent standards of proof for fraudulent concealment, which is a question of federal rather than state law. *Compare In re* Beef Indus. Antitrust Litigation, 600 F.2d 1148, 1170-71 (5th Cir. 1979) (defendant must prove that plaintiff knew or should have known that cause of action existed), and Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (plaintiff must prove that defendant concealed the wrong, and that he remained ignorant through no fault of his own); *with* Schaefer v. First Nat'l Bank of Lincolnwood, 509 F.2d 1287, 1297 (7th Cir. 1975) (plaintiff must prove wrongful concealment by defendant, his failure to discover within the statutory period, and his own due diligence).

7. 15 U.S.C. § 22 (1976). *See also* Ballard v. Blue Shield of S.W. Va., Inc., 543 F.2d 1075, 1080 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

8. 15 U.S.C. §§ 77a, 78aa (1976). *See also* Leroy v. Great W. United Corp., 99 S.Ct. 1494 (1979); International Controls Corp. v. Vesco, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974).

9. For example, patent infringement actions are governed by 28 U.S.C. § 1400(b), which provides as follows: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." This statute is exclusive and cannot be supplemented by any other venue statute. Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222 (1957).

10. The leading cases are Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Skil Corp. v. Millers Falls Co., 541 F.2d 554 (6th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976); Chicago, R.I. & P.R. Co. v. Igoe, 212 F.2d 378, 382 (7th Cir. 1954), *appeal after remand*, 220 F.2d 299, 304 (7th Cir. 1955), *cert. denied*, 350 U.S. 822 (1955). Mandamus is the proper procedure for challenging the propriety of a transfer pursuant to 28 U.S.C. § 1404(a). Caleshu v. Wangelin, 549 F.2d 93, 96 (8th Cir. 1977); Skil Corp. v. Millers Falls Co., 541 F.2d 554, 557 (6th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976).

11. Change of venue may not always change the applicable law. In VanDusen v. Barrack, 376 U.S. 612 (1964), a diversity action, the Supreme Court pointed out that "[t]he decisions of the lower

10b-5 action has already been mentioned,[12] and the varying tests used to determine standing to sue under the antitrust laws[13] have also made the selection of the forum an important factor in antitrust actions. Second, because the number of pending cases, the number of judges, and the effect of criminal "speedy trial" acts vary from jurisdiction to jurisdiction, counsel may be able to advance or postpone the trial date (within limits) by having the case transferred to a different forum. Since the timing of lawsuits can often be critical, transfer to another forum may confer a substantial tactical advantage. Finally, a defendant may be able to decrease the cost and annoyance of trying the action by transferring it to a more convenient forum. Convenience, without more, will frequently warrant a motion to change venue, and counsel should not ignore the advantages of trying the case in a local forum when assessing the merits of a marginally advantageous motion.

B. *The Proper Parties*

At an early stage of the litigation, the defendant should determine if the proper parties (from his standpoint) are before the court. This question can be raised by a motion challenging standing,[14] the real party in

federal courts, taken as a whole, reveal that courts construing § 1404(a) have been strongly inclined to protect plaintiffs against the risk that transfer might be accompanied by a prejudicial change in applicable *state* laws." *Id.* at 630 (emphasis added). The Court went on to hold that "the transferee district court must be obligated to apply the *state* law that would have been applied if there had been no change of venue. . . ." *Id.* at 639 (emphasis added). *See also* Headrick v. Atchison T. & S.F. Ry. Co., 182 F.2d 305 (10th Cir. 1950) (holding that an action originally brought in a New Mexico state court, removed to a New Mexico federal court under 28 U.S.C. § 1331, and finally transferred to a California district court would still be governed by New Mexico law).

The scope of *VanDusen* is unclear, however, since jurisdiction was based upon diversity of citizenship and different choice of laws rules apply in diversity actions. *See* Walko Corp. v. Burger Chef Systems, Inc., 554 F.2d 1165, 1167-71 (D.C. Cir. 1977). There are few cases that discuss the effect of transfer under 28 U.S.C. § 1404 (a) when the claim is based on federal law. *In re* Pittsburgh & Lake Erie R.R. Co. Sec. & Antitrust Litigation, 543 F.2d 1058 (3d Cir. 1976), is indicative of the cases that do raise this issue:

> All of these opinions assumed that the rule of *Van Dusen v. Barrack, supra*, determines the interpretation of *federal* law which the transferor district would apply. It is difficult to understand why this should be so since *Van Dusen v. Barrack* involved conflicting *state* wrongful death policies, while, in theory at least, federal law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.

Id. at 1065 n.19 (emphasis in original). *See also* DeMateos v. Texaco, Inc., 562 F.2d 895, 899 (3d Cir. 1977). Since federal courts frequently refuse to apply state laws when doing so would frustrate the enforcement of a federal statute, *see, e.g., In re* Pittsburgh & Lake Erie R.R. Co. Sec. & Antitrust Litigation, 543 F.2d 1058, 1065-67 (3d Cir. 1976); Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1972) (securities action), a transfer under 28 U.S.C. § 1404(a) may well be outcome determinative when two courts of appeals have interpreted a federal statute differently.

12. *See* note 6 and accompanying text *supra*.

13. *Compare* Costner v. Blount Nat'l Bank of Maryville, Tenn., [1978-1] Trade Cas. ¶ 62,115 (6th Cir. 1978), *and* Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), *with* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362-64 (9th Cir. 1955) (the "target area" test). *See also In re* Multidistrict Vehicle Air Polution M.D.L. No. 31, 481 F.2d 122, 126-29 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) (comparing the Ninth Circuit's target area approach with the "direct injury" approach of some other circuits). A particularly good discussion of standing under the antitrust laws can be found in Shapiro v. General Motors Corp., [1979-2] Trade Cas. ¶ 62,725 (D. Md. 1979), and Fincher v. American Airlines, Inc., [1979-1] Trade Cas. ¶ 62,590 (S.D.N.Y. 1979).

14. Both Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), and Piper v. Chris-Craft

interest,[15] or personal jurisdiction.[16] The defendant should also consider whether the named plaintiffs and defendants are suitable representatives when the action is brought on behalf of a corporation[17] or as a class action,[18] and the effect of the assignment of a contract, a corporate merger or acquisition, or a parent-subsidiary relationship on the plaintiff's ability to bring the suit.[19] Finally, the possibility that diversity jurisdiction[20] or venue[21] could be destroyed by joining additional parties (forcing the plaintiff to refile his action in a forum more advantageous to the defendant) should be considered.

C. *The More Beneficial Trier of Fact*

A motion to strike a demand for a jury trial on the ground that the action is too complex for a jury (that is, that the trial of the action is beyond the practical abilities and limitations of a jury) can be another method of structuring an action to one's advantage—if the action presents facts sufficient to support such a motion.[22] Counsel may also want to choose the

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Indus., Inc., 430 U.S. 1 (1977), restricted standing under the federal securities laws. Standing under the antitrust laws is discussed in note 13 *supra*. *See also* AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS 257-70 (1975); Berger, *An Analytic Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977); Crane Co. v. American Standard, Inc., 603 F.2d 244 (2d Cir. 1979).

15. FED. R. CIV. P. 17(a). *See also* Sell v. Volkswagen of America, Inc., 505 F.2d 953 (6th Cir. 1974); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

16. Recent cases have restricted long-arm jurisdiction to some extent. Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977). *See also* Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974) (affirming a lower court's decision to quash service of process and holding that jurisdiction over a corporation does not, by itself, confer jurisdiction over individual corporate officers).

17. *In the Matter of* Bowen Transports, Inc., 551 F.2d 171 (7th Cir. 1977) (refusing to pierce the corporate veil); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (mutual fund shareholder); cases collected in AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS 259 (1975).

18. *See* FED. R. CIV. P. 23. *See also* Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977) (plaintiffs were not adequate class representatives when they were a relative or partner of counsel for plaintiff); Turoff v. May Co., 531 F.2d 1357, 1360 (6th Cir. 1976) (court found conflict of interest when plaintiffs were the three attorneys for plaintiffs and one of the attorney's wife since plaintiffs' interest was recovering a substantial fee rather than maximizing the return for class members); Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1454-98 (1976).

19. *See, e.g.*, Sherman v. British Leyland Motors, Ltd., [1979-2] Trade Cas. ¶ 62,784 (9th Cir. 1979); Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir. 1979) (parent corporation not liable for subsidiary's negligence under doctrine of *respondeat superior*); United States v. Michigan Carton Co., 552 F.2d 198, 200-01 (7th Cir. 1977) (criminal antitrust action).

20. Diversity jurisdiction under 28 U.S.C. § 1332(a) (1976) requires complete diversity, *i.e.*, none of the plaintiffs may reside in the same state as any of the defendants. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). *See also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-74, 377 (1978). Problems of manipulation of citizenship status, collusion to create or defeat federal diversity jurisdiction, and realignment of parties as plaintiffs or defendants are summarized in Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 969-79 (1979).

21. In an action based on federal question jurisdiction, 28 U.S.C. § 1331 (1976), the joinder of a defendant who resides in a district different from the district of the other defendant's residence would mean that the action must be brought in the district "in which the claim arose." 28 U.S.C. § 1391(b) (1976). *See* Leroy v. Great W. United Corp., 99 S. Ct. 1494 (1979).

22. *See generally* Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV.

opposite course, either requesting a jury in the initial pleading or "not later than ten days after the service of the last pleading directed to the issue" triable by the jury,[23] or requesting the court in its discretion to empanel a jury.[24]

Another possibility that should be considered is a request that the court submit interrogatories to the jury.[25] The use of interrogatories, as compared to a special verdict,[26] requires the jury to reach a general verdict as well as answering specific questions concerning its findings. A trial court is under no duty to use jury interrogatories, but a refusal may be reviewed for abuse of discretion.[27] Well-drafted interrogatories[28] will reveal the basis (or lack thereof) of the jury's decision and may also cause the jury to consider the factual issues more carefully. For example, if the action requests both damages and equitable relief, a party may want to use interrogatories to establish that the jury granted one form of relief as a

898 (1979). *See also* Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 675 (9th Cir. 1975) (no error in denial of jury in view of the complexity of the anticipated issues); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., [1979-2] Trade Cas. ¶ 62,753 (E.D. Pa. 1979) (denying defendant's motion to strike a jury demand in a complex antitrust action holding that a court cannot consider the practical abilities and limitations of jurors); *In re* United States Financial Sec. Litigation, [1978] SEC. L. REP. (CCH) ¶ 96,301 (S.D. Cal. 1977) (jury demands stricken when trial expected to last two years, there were 18 consolidated suits, and the parties and the legal theories were interrelated); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976) (granting motion to strike jury demand); Tomac, Inc. v. Coca-Cola Co., 418 F. Supp. 359 (C.D. Cal. 1976). The *Zenith* Court certified its decision for immediate appeal under 28 U.S.C. § 1292(b) (1976), indicating that "the question certified is one of the raging questions in the law today." [1979-2] Trade Cas. ¶ 62,753, at 79,171.

23. FED. R. CIV. P. 38(b).

24. FED. R. CIV. P. 39(b). *Cf.* 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 2.60, at 115-16 (2d ed. 1979) (use of advisory juries under FED. R. CIV P. 39 (c) & 48). *See also* VA. CODE § 8.01-336(E) (1978) (discretionary use of a jury in an equity action); Dull v. Dull, 140 Va. 370, 381, 125 S.E. 142, 145 (1924); and Catron v. Norton Hardware Co., 123 Va. 380, 96 S.E. 853 (1918), all interpreting that statute.

25. FED. R. CIV. P. 49(b). *See also* Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 258 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1289 (1979); Jamison Co. v. Westvaco Corp., 526 F.2d 922, 935 (5th Cir. 1976).

26. FED. R. CIV. P. 49 (a). The seminal authority in this area is Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1967).

27. It is a duty of the trial court to see that proper forms of verdict are provided to the jury. Scott v. Isbrandtsen Co., 327 F.2d 113, 121 (4th Cir. 1964). The possibility of obtaining a reversal on appeal was discussed in Great Costal Express, Inc. v. International Bhd. of Teamsters, 511 F.2d 839 (4th Cir. 1975), *cert. denied*, 425 U.S. 975 (1976):

> [W]e . . . note that there apparently has never been a reversal for abuse of discretion in determining the form of verdict. We hold, with Toth v. Corning Glass Works, 411 F.2d 912, 914 n.2 (6th Cir. 1969), that where the complaining party made no request for a special verdict to the trial court, it cannot raise the issue for the first time on appeal.

511 F.2d at 845 (citation omitted). The court's comment concerning special verdicts applies with equal force to requests for jury interrogatories: "In a complicated case such as this, the special interrogatory device localizes and focalizes the specific problems and issues whereas a general verdict often permits improper jury meandering at trial and presents impossible matching efforts on appeal." Jamison Co. v. Westvaco Corp., 526 F.2d 922, 935 (5th Cir. 1976).

28. Interrogatories to the jury that were actually used in complex cases are quoted in General Beverage Sales Co. v. East-Side Winery, [1978-1] Trade Cas. ¶ 61,815 at 73,395-96 (7th Cir. 1978) (antitrust and contract); Heatransfer Corp. v. Volkswagenverk, A.G., 553 F.2d 964, 969 n.1 (5th Cir. 1977, *cert. denied*, 434 U.S. 1087 (1978) (antitrust action); Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 922 (2d Cir. 1977) (contract action); Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 80 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (antitrust action); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1340 (3d Cir. 1975) (antitrust action).

compromise, although the facts supported an award of both (or neither) damages and equitable relief. Counsel should remember, however, that a jury may be confused by unduly complex interrogatories,[29] and that careful drafting is an indispensable part of their use.[30]

In assessing whether a case should be tried to a jury or to the bench, counsel should consider the complexity of the action, the length and subject of the trial, the possibilities of confusion and prejudice, and the fact that it is more difficult to secure a reversal for the admission of inadmissible evidence when the action is tried to the court.[31] As an alternative, a party might ask the trial court to adopt innovative methods of determining fact, using the existing literature[32] to inform the court of the difficulties that frequently accompany the use of juries in complex civil actions.[33] These innovations might include permitting jurors to take notes,[34] to ask questions,[35] or to use "jury books" of exhibits.[36]

D. *The Points on Which the Case Should Turn*

Another question is: What claims, issues, or defenses should be decided, and in what order? Complex cases may often be resolved on more than one ground, and many times the selection of issues and the order in which they will be tried will determine which party emerges from the courtroom with a judgment in his favor. Two procedures are particularly

29. "Double questions, or questions in the alternative, should be avoided." Scarborough v. Atlantic Coast Line R. Co., 190 F.2d 935, 938 (4th Cir. 1951). "It is true that if an issue is framed in an alternative which proposes different or inconsistent theories, and the answer of the jury is a simple yes or no, the verdict may be so ambiguous that it will not support a judgment." Seaboard Air Line R.R. Co. v. Gill, 227 F.2d 64, 66 (4th Cir. 1955).

30. Scott v. Isbrandtsen Co., Inc., 327 F.2d 113, 119 (4th Cir. 1964) held that "the form of the special issues should be such as not to mislead or confuse the jury." The interrogatories should be in question form and questions of damage should always be separated from questions of liability. Cunningham v. M-G Transp. Servs., Inc., 527 F.2d 760, 761-62 (4th Cir. 1975). The factors to be used to determine the adequacy of the special interrogatories are listed in Tights, Inc. v. Acme McCrary, Corp., 541 F.2d 1047, 1060 (4th Cir.), *cert. denied*, 429 U.S. 980 (1976) (patent infringement action), and Dreiling v. General Elec. Co., 511 F.2d 768, 774 (5th Cir. 1975) (products liability action).

31. Northwestern Nat'l Cas. Co. v. Global Moving & Storage, Inc., 531 F.2d 320, 324 (6th Cir. 1976).

32. Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

33. Examples of possible innovations are listed in Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 915 (1979); Note, *Developments in Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 981 (1959).

34. *See* text accompanying notes 192, 193 *infra*.

35. The best way to handle questions by jurors is for the juror to ask his question of the trial judge, who then puts the question (in acceptable form for purposes of the rules of evidence) to the witness, or tells the juror that the question cannot be asked for evidentiary reasons. No error should result if this approach is used.

36. This author and one of his partners have used "jury books" in the trial of complex antitrust, breach of contract, and breach of warranty actions in federal district courts in Ohio, Virginia, and California. A jury book is a notebook of selected trial exhibits to be used by the party preparing the book during a particular day's direct or cross-examination. Each juror has a jury book containing from one to fifty trial exhibits. The exhibits are tabbed and at the beginning of a question about a document the jury is told to turn to a particular tab to find that document. This procedure enables the jurors to follow along and to retain the testimony better than they could without such a device. It is also faster than passing a single exhibit or a series of exhibits among the jurors.

useful for shaping the issues to be tried, the motion for summary judgment and the motion for an early, separate trial of a claim, issue, or defense.

1. *Summary Judgment*

Even when unsuccessful, a motion for summary judgment often serves the purpose of forcing an opponent to reveal parts of his case he has avoided disclosing during discovery. More importantly, however, summary judgment may completely dispose of an issue.[37]

A motion for summary judgment is appropriate if the matter in issue presents only questions of law.[38] Appellate courts have traditionally applied strict standards when reviewing lower court decisions that grant summary judgment,[39] but the fact remains that a trial court *must* grant a motion for summary judgment if it raises "no genuine issue of material fact."[40] The entry of summary judgment does not require that there be no issues of fact, only that there be no issues of *material* fact,[41] and a party can always argue that the factual questions raised by his opponent are immaterial given the governing law.[42]

Summary judgment motions are particularly useful in contract actions. The interpretation of a contract is a question for the court, and may appropriately be resolved on a motion for summary judgment.[43] The motion will probably not raise questions of fact since, at least when a contract is unambiguous on its face, the parol evidence rule precludes the admission of extrinsic evidence.[44] A liquidated damages clause could also

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37. General comments concerning the use of a motion for summary judgment can be found in Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974); Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977). Since summary judgment motions are adequately discussed in these and other articles, the discussion in this article will be limited to the use of summary judgment motions as a tool for structuring complex civil actions.

38. FED. R. CIV. P. 56.

39. A leading case on this point is S. J. Groves & Sons Co. v. Ohio Turnpike Comm'n, 315 F.2d 235, 237 (6th Cir.), *cert. denied*, 375 U.S. 824 (1963). *See also* Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979); United States v. Lowell, 557 F.2d 70, 72 (6th Cir. 1977); Arnold Palmer Golf Co. v. Fuqua Indus., Inc., 541 F.2d 584, 588 (6th Cir. 1976); Board of Educ. v. Department of HEW, 532 F.2d 1070, 1071 (6th Cir. 1976); Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 771 (3d Cir. 1976).

40. FED. R. CIV. P. 56.

41. *Id.*

42. In this sense the motion for summary judgment meets the traditional standard for a motion to dismiss set forth in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), and followed in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), and numerous lower court cases, *see, e.g.*, Smart v. Ellis Trucking Co. 580 F.2d 215, 218 n.3 (6th Cir. 1978); Ott v. Midland-Ross Corp., 523 F.2d 1367, 1369 (6th Cir. 1975). *Conley* was quoted with approval in Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976), an antitrust action which held that motions to dismiss should rarely be granted in antitrust cases, in which proof may be in the hands of conspirators, before ample discovery is allowed.

43. Local 783 Allied Indus. Workers v. General Elec. Co., 471 F.2d 751, 757 (6th Cir. 1973), *cert. denied*, 414 U.S. 822 (1975). For an example of a successful summary judgment motion based on this argument, see Ralli-Coney, Inc. v. Gates, 528 F.2d 572, 574 (5th Cir. 1976) (holding that partial summary judgment on the issue of liability was properly granted when the contract was unambiguous and the parol evidence rule did not permit introduction of oral testimony).

44. Industrial Equip. Co. v. Emerson Elec. Co., 554 F.2d 276, 284 (6th Cir. 1977); Robin v. Sun

be the basis for deciding a case on a motion for summary judgment, since, absent an allegation of fraud, a liquidation clause makes it very difficult to raise material issues concerning damages.[45] Finally, a motion for summary judgment may be an extremely beneficial means of arguing the effect of an "integration clause" or "merger clause." These clauses, which provide that the written contract is the sole and exclusive agreement of the parties,[46] are frequently used in modern franchise and other major agreements. A summary judgment motion[47] permits a party to use an integration clause offensively—to carve out a key portion of the opponent's case[48]—rather than as a shield—for example, in support of an objection to the testimony of a witness—behind which to hide at trial.

A defendant can use a summary judgment motion most effectively when he seeks to establish one or more defenses raised in his answer.[49] Early discovery directed at establishing the facts necessary to support one or more defenses and a promptly filed motion for summary judgment is the best way for a defendant to counter his opponent. This course of action puts the plaintiff on the defensive and can, if vigorously pressed, cause the plaintiff to lose the initiative.

A particularly devastating tactic is to file a motion for partial summary judgment directed at all the issues of opponent's case that can be decided on legal or narrow factual grounds.[50] A successful motion for

Oil Co., 548 F.2d 554, 557 (5th Cir. 1976); EAC Credit Corp. v. King, 507 F.2d 1232, 1241 (5th Cir. 1975); Local 783 Allied Indus. Workers v. General Elec. Co., 471 F.2d 751, 757 (6th Cir. 1973), *cert. denied*, 414 U.S. 822 (1973); Pavlik v. Consolidation Coal Co., 456 F.2d 378 (6th Cir. 1972). The trend toward a more liberal interpretation of the parol evidence rule may temper the effectiveness of this tactic. *See* 3 CORBIN ON CONTRACTS § 579 (1960 & Supp. 1971); RESTATEMENT (SECOND) OF CONTRACTS § 240 (Tent. Draft Nos. 1-7, 1973).

45. A trial court's entry of partial summary judgment based upon a liquidated damages provision was affirmed in Worthington Corp. v. Consolidated Aluminum Corp., 544 F.2d 227, 234-35 (5th Cir. 1976).

46. *See* U.C.C. § 2-202(b) (1977). *See also* Franz Chem. Corp. v. Philadelphia Quartz Co., 594 F.2d 146, 149 (5th Cir. 1979) (interpreting a typical merger clause).

47. A summary judgment motion based upon an integration clause seldom raises factual questions. The court must determine that the clause is ambiguous before testimony concerning the meaning of the clause or the intention of the parties is relevant, and integration clauses are seldom drafted in any but the clearest language. *See* Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676, 680 (9th Cir. 1979) ("because we find the Agreement to be unambiguous in regards to the provisions involved herein, we may not resort to alleged antecedent understandings or parol evidence to create a genuine issue of fact as to the meaning of those provisions"). *Cf.* 3 CORBIN ON CONTRACTS § 579 (1960 & Supp. 1971); RESTATEMENT (SECOND) OF CONTRACTS § 240 (Tent. Draft Nos. 1-7, 1973).

48. Lee v. Flintkote Co., 593 F.2d 1275, 1277 n.6 (D.C. Cir. 1979), affirmed a grant of summary judgment for the defendant in an action for intentional interference by a third party with contractual relations, in which the franchise agreements contained a merger clause and no ambiguity in the contract was found. *Accord*, Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676, 680 (9th Cir. 1979) (automobile dealership agreement).

49. Statute of limitations defenses are a particularly good example. *But see* Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168, 171 (10th Cir. 1974) ("While cases involving defenses hinging upon applicable statutes of limitation frequently lend themselves to summary judgment proceedings, a court should not grant summary judgment for a defendant if there is a viable issue of fact as to when the limitations period began.").

50. The author has met with mixed success in using motions for partial summary judgment to determine issues raised by a defense. In State v. Klosterman French Baking Co., [1977-1] Trade Cas. ¶ 61,361 (S.D. Ohio 1976), a partial summary judgment motion based on an allegation of laches was

partial summary judgment can narrow the scope of discovery yet to be conducted, increase the chances for a favorable settlement, and remove trivial issues from contention, permitting the jury to focus on the more complex and difficult issues of fact. Moreover, counsel for the opposing party can resist a summary judgment motion effectively only by describing his case, his view of the issues, and his expected proof. A motion for summary judgment or partial summary judgment therefore carries the added benefits of forcing the opponent to reveal his case, of preventing any surprise at trial, and of producing a response that will almost surely contain admissions and inconsistent statements that can be used against the opponent in further discovery proceedings, other motions, and a trial brief. The reply will also, in many cases, reveal the gaps in one's discovery and point out any additional steps that may be necessary to prepare adequately for trial.

A motion for partial summary judgment should always be accompanied by a request for a statement, pursuant to Federal Rule of Civil Procedure 54(b), that the court is directing the entry of final judgment and that there is no reason for delaying an appeal. A suggested form of order, which includes this certification, should be attached to the motion as an exhibit. The effect of this procedure will be (1) to obtain final disposition of the claims at issue, thereby preventing the court from later changing its mind, and (2) to force one's opponent to appeal the entry of partial summary judgment immediately if he wishes to keep that issue alive, forcing him to litigate part of his case in the court of appeals and part in the trial court.[51]

2. *Separate Trials*

Another type of motion that is seldom used, but that can be used to great advantage, saving the parties' and the court's time and money, is the motion for a separate trial of certain claims or issues. The most common method of separating issues in a complex civil case is the bifurcated trial, in

denied when the court determined that the four year statute of limitations provided by the Clayton Act, 15 U.S.C. § 15b (1976), did not preempt an Ohio statute that included no statute of limitations. On the other hand, a motion for partial summary judgment was successful in Federal Property Management Corp. v. Harris, 448 F. Supp. 560 (S.D. Ohio 1978), *rev'd on other grounds*, 603 F.2d 1226 (6th Cir. 1979).

51. "Rule 54(b) is designed to permit appeals from partial judgments when one or more, but less than all claims are decided." Saalfrank v. O'Daniel, 533 F.2d 325, 330 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976). *See also* Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166, 1168-69 (5th Cir. 1978) (collecting cases); William B. Tanner Co. v. United States, 575 F.2d 101, 102 (6th Cir. 1978). Counsel opposing the appeal can, of course, contest certification under Rule 54(b) on appeal, either because the order is not a final determination of one or more issues or because the trial court abused its discretion in certifying the order under Rule 54(b). *See* Brunswick Corp. v. Sheridan, 582 F.2d 175, 182-85 (2d Cir. 1978) (holding that the trial court abused its discretion by including a Rule 54 (b) certification in its order dismissing a counter-claim based on the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), since the defense that the contract sued upon violated the antitrust laws, was unenforceable, and inextricably interrelated to the counterclaim); Schaefer v. First Nat'l Bank of Lincolnwood, 465 F.2d 234, 235 (7th Cir. 1972) ("There is no question that this court may review the propriety of the granting by the district court of the plaintiff's motion for a Rule 54(b) determination.").

which liability issues are tried first and damage issues, which often involve complex expert testimony, are reserved for a separate trial.[52] The trial of the damages issues can even be postponed until an appeal from the entry of judgment on liability is decided.[53] Of course, in some cases, for example antitrust actions, a proposal for a bifurcated trial would be subject to the objection that injury (the fact of damage as opposed to the amount of damage) is an element of the plaintiff's case.[54] Moreover, although the bifurcated trial has much to recommend it,[55] counsel may sometimes wish to try both liability and damages issues to the same jury.

The use of a motion for a separate trial of a single claim, issue, or defense can save even more time and money than the bifurcated trial. Even the liability phase of a complex civil action can be quite lengthy, and the use of the motion for separate trial offers the court the tempting opportunity to resolve (or, at least, possibly to resolve) a complex case in a two or three day trial of a single issue rather than in a multi-week trial of all the issues. As one court has noted: "From the standpoint of both the court and the parties, it is better to fight the battle which might win the war, than to by-pass the battle and fight the whole war as a means for determining whether, in the first instance, the battle should have been fought."[56] Moreover, as other courts have pointed out, complex civil actions are sometimes too much for a jury to consider in one sitting:

> To expect a jury to assimilate the economic and historical condition of an entire industry, keeping separate the conspiracy claims from the non-conspiracy claims, bearing in mind the relevant markets for myriad products at different points in time, and to understand what would inevitably be an enormously complex charge at the end of trial is to expect too much. In our view, such a trial would carry with it an inherent likelihood of prejudice.[57]

Despite the advantages, however, courts have been reluctant to grant separate trials, mainly because the trial of individual issues encourages fragmented litigation.[58]

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52. *In re* Master Key Antitrust Litigation, 528 F.2d 5, 14 (2d Cir. 1975); Warner v. Rossignol, 513 F.2d 678, 684 (1st Cir. 1975); Cale v. Outboard Marine Corp., 48 F.R.D. 328, 329 (E.D. Wis. 1969).

53. This procedure was utilized in Phillips v. Crown Cent. Petroleum Corp., 426 F. Supp. 1156 (D. Md. 1977), *on appeal*, [1979-2] Trade Cas. ¶ 62,743 (4th Cir. 1979).

54. *See* C.W. Regan, Inc. v. Parsons Brinckerhoff, Quade & Douglas, 411 F.2d 1379 (4th Cir. 1969) (separate trials on liability and damages should not have been held because that procedure eliminated evaluation of amount of damages resulting from conduct of plaintiff and from conduct of other contractor). Recovery under the Sherman and Clayton Acts is available only "where actual injury has been suffered." Gray v. Shell Oil Co., 469 F.2d 742, 749 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). *See also* Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1205 (9th Cir.), *cert. denied*, 425 U.S. 959 (1976).

55. 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 4.12, at 167 (2d ed. 1979).

56. Seven-Up Co. v. O-So Grape Co., 177 F. Supp. 91, 100-01 (S.D. Ill. 1959) (granting a motion for separate trial of the defense of laches in advance of the trial of other issues in a complicated trademark infringement action).

57. Reading Indus., Inc. v. Kennecott Copper Corp., 61 F.R.D. 662, 665 (S.D.N.Y. 1974).

58. *See, e.g.*, Molinaro v. Watkins-Johnson CEI Division, 60 F.R.D. 410, 413 (D. Md. 1973) (a patent infringement action).

The power to grant a separate trial on one or more issues is discretionary.[59] In determining whether to grant a request, courts will typically consider a number of factors, including (1) whether a separate trial would avoid prejudice, (2) whether one or more claims or defenses present factual and legal questions that differ significantly from the remainder of the case, (3) whether a single trial of all the claims would be intolerably complicated, and (4) whether a separate trial of one or a limited number of issues might dispose of the entire case.[60] Thus, for example, the courts have granted separate trials of counterclaims that seek both rescission and damages,[61] of antitrust claims when they are joined in a contract action,[62] of separate agency issues that could resolve the entire case,[63] and, in a products liability action, of "a substantial issue of material fact which, if resolved in defendant's favor, would exonerate defendant from liability."[64]

Of course, some cases are more susceptible to disposition via a separate trial than are others. The affirmative defense of release, for example, provides an excellent opportunity for a separate trial, since "the effect of release upon co-conspirators shall be determined in accordance with the intentions of the parties."[65] A brief trial of this issue in an action brought after the defendant's co-conspirators have settled with the plaintiff could resolve the case with a minimum of expenditure of time and money. Indeed, this defense is one of the issues that the *Manual for Complex Litigation* recommends for separate trial.[66] Virtually any of the affirmative defenses listed in Federal Rule of Civil Procedure 8(c) can be made the basis of a motion for summary judgment or a motion for a separate trial of an issue.[67]

Another possible use for a motion for an early, separate trial would be to separate conspiracy claims from breach of contract claims or other tort claims. The motion would be based upon the idea that "[t]he tort of 'conspiracy' is poorly defined, and highly susceptible to judicial expansion."[68] Numerous issues can be presented by conspiracy claims that

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59. FED. R. CIV. P. 42; OHIO R. CIV. P. 42(B); VA. CODE § 8.01-272 (1978).

60. *See generally* Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure*, 39 MINN. L. REV. 743 (1955); Note, *Original Separate Trials on Issues of Damages and Liability*, 48 VA. L. REV. 99 (1962).

61. Value Line Fund, Inc. v. Marcus, 161 F. Supp. 533 (S.D.N.Y. 1958).

62. Gutor Int'l AG v. Raymond Packer Co., 493 F.2d 938, 947 (1st Cir. 1974).

63. Rossano v. Blue Plate Foods, Inc., 314 F.2d 174, 176-77 (5th Cir. 1963).

64. Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 542 (8th Cir. 1977).

65. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 345 (1971).

66. 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 4.12, at 169 (2d ed. 1979).

67. *See* Value Line Fund, Inc. v. Marcus, 161 F. Supp. 533 (S.D.N.Y. 1958) (separate trial of defense of laches).

68. United Mine Workers v. Gibbs, 383 U.S. 715, 732 (1966) (footnote omitted). "The history of conspiracy, as Mr. Justice Jackson has pointed out, exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' " Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J.,

are not presented by breach of contract or tort claims, including (1) the existence of the necessary plurality of persons (in the eyes of the law);[69] (2) whether a combination or agreement existed; (3) whether the combination was effected by concerted action to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means;[70] (4) whether overt acts were commited by each of the conspirators in furtherance of the conspiracy; (5) whether the plaintiff's injuries were proximately caused by the alleged conspiracy; (6) various defenses inherent to conspiracy actions, such as withdrawal from the conspiracy;[71] and (7) the evidentiary problems peculiar to conspiracy trials.[72]

The argument in support of a motion for an early, separate trial should always specify (1) precisely what relief is sought; (2) the resulting benefits (in terms of trial time and expense) if the motion is granted; (3) whether prejudice will be prevented if the motion is granted; (4) what facts appear in the record before the court, particularly in the depositions on file and the supporting affidavit attached to the memorandum, that justify the relief sought; and (5) what authorities support the motion.[73]

3. *The Use of Motions for Summary Judgment or Separate Trial*

It has long been recognized that insufficient use is made of the techniques for separately trying one issue that could dispose of a complex civil case. In addressing the Seminar on Protracted Cases for United States District Judges, held at Stanford University in 1958, one speaker observed that:

> One way that we can shorten the trial of these protracted cases is to have a separate trial of certain issues or possibly one issue. Rule 41(b), 28 U.S.C.A. gives us ample opportunity to do that. But it has been my experience that very

concurring), *citing* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1922). *See also* Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922 (1959).

69. A corporation cannot conspire with its officers or directors since the necessary duality of persons is not present. Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). *See also* Dorsey v. Chesapeake & Ohio Ry. Co., 476 F.2d 243, 245-56 (4th Cir. 1973); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 (9th Cir. 1969).

70. Harrison v. United Transp. Union, 530 F.2d 558 561 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), held that "a civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means." *See also* Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922 (1959) ("Conspiracy is usually defined as an agreement between two or more persons to achieve an unlawful object or to achieve a lawful object by unlawful means.").

71. Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 957-73 (1959).

72. In addition to the co-conspirators exception to the hearsay rule, *see* text accompanying notes 146-52 *infra*, the rule that once the existence of a conspiracy is established, only slight evidence is sufficient to connect a defendant with it, *see* United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979) may lead the jury to confuse evidence of participation in the alleged conspiracy with evidence of a substantive breach of contract or other law. *See* Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 979, 980-81, 993.

73. This course is recommended by 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 1.70 at 94 (2d ed. 1979).

> few lawyers and not many judges take advantage of Rule 41(b) which provides very broadly that in the furtherance of convenience the trial judge may separately try any issue in the case. Certainly to expedite or to facilitate the trial the trial judge may direct by pretrial order a separate trial of any issue.[74]

A second speaker was also of the opinion that these procedures should be utilized more often:

> There are many cases in which the issues raised by affirmative defenses will readily lend themselves to separate trial and disposition. It should be obvious that in these cases, if the decision of the court on these issues results in a final judgment dispositive of the whole litigation, there will be a distinct advantage. The protracted case may be brought to an early end without a trial of the issues raised by the plaintiff's claim for relief.[75]

These early thoughts have now become the recommended procedure for complex civil actions.

The *Manual for Complex Litigation* today recommends that early discovery be conducted in certain circumstances, including those "where there is a narrow issue which may be decisive on the merits, such as the statute of limitations, *res judicata*, collateral estoppel,[76] accord and satisfaction, and the like."[77] When a potentially decisive issue is presented, counsel should follow this recommendation by filing a motion for expedited or early discovery on that issue alone. Once discovery is completed, counsel will be in an excellent position to file and argue a motion for an early, separate trial of that issue.

The *Manual for Complex Litigation* also recommends that "separate trials of separate issues be utilized" to achieve the benefits of more orderly presentation of evidence, a better understanding of the evidence, and the avoidance of unnecessary trial of other issues.[78] It lists a number of issues

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74. Searls, *Methods of Shortening Trials, Proceedings of the Seminar of Protracted Cases for United States Judges*, 23 F.R.D. 319, 603 (1958).

75. Smith, *Defining the Issues and Establishing a Plan for Trial, Proceedings of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 319, 416 (1958).

76. In Parklane Hosiery Co. v. Shore, 99 S. Ct. 645 (1979), a stockholders' class action seeking rescission and damages under the Securities and Exchange Act of 1934, 15 U.S.C. § 78a-78kk (1976), the Supreme Court approved the offensive use of collateral estoppel, and held that a party against whom an issue of fact had been adjudicated adversely in an equitable proceeding may be collaterally estopped from relitigating the same issue in a legal action before a jury. *See also* Blonder-Tongue Labs. Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971) (permitting the defensive use of collateral estoppel); Jacobs, *Affirmative Defenses to Securities Exchange Act Rule 10b-5 Actions*, 61 CORNELL L. REV. 857 (1976). Developments of this type make collateral estoppel a particularly appropriate topic for a separate decision.

77. 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 1.70, at 94 (2d ed. 1979) (footnote omitted). Footnote 166 to that paragraph suggests:

> In Securities actions under § 10(b) of the Securities Exchange Act and Rule 10b-5 of the Securities and Exchange Commission, a possible issue for early emergency discovery to determine whether the action may be maintained is whether the plaintiff can show any damages as of the date they are to be measured. See, e.g., Harris v. American Investment Company, 523 F.2d 220 (8th Cir. 1975), cert. denied, 423 U.S. 1054, 96 S. Ct. 784, 46 L.Ed 2d 643 (1976).

78. 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 4.12, at 166 (2d ed. 1979).

that may be suitable for separate trials, including the statute of limitations, claims under different laws (for example, separation of claims under section 1 and 2 of the Sherman Act from Robinson-Patman claims), separation of liability and damages issues, separation of primary claims from counter-claims, cross-claims, or third party claims, release, and agency.[79]

A motion for summary judgment and for a separate, prior trial of an issue can be used in conjunction with expedited discovery as part of a plan to end a particular action expeditiously. The procedure is simple: First, a party moves for expedited discovery on a narrow issue or defense that could be dispositive of the case, or else initiates and pursues such discovery on his own without alerting his opponent to his intention. Next, the party moves for summary judgment on the issue or defense that he is now prepared to meet, which is the only issue ripe for consideration because it alone has been developed through early discovery. Finally, if the opponent raises a factual question in response to the motion for summary judgment, the party promptly moves for an early, separate trial of that issue or defense. The motion for a separate trial should be granted since (1) no other issue or defense will have been factually or legally developed; (2) the parties' discovery and briefing should enable them to try this issue or defense with much less preparation than would be required for any other issue or defense; (3) the court has been educated about the issue; and (4) an early trial of the issue or defense will cost both the parties and the court less time and money than a full trial on the merits.

The motion for summary judgment and the motion for an early, separate trial complement each other. One's opponent should be trapped between the two motions: obviously, he will not want to concede the summary judgment motion, yet by resisting, he will almost certainly create factual issues susceptible to decision in a separate trial. These factual issues appear much simpler to resolve than the full panoply of issues presented by a trial on the merits, and the judge is likely to rule in favor of the early, separate trial. However, counsel will not be able to carry out this strategy if he simply suggests the plan to the court or to his opponent. An aggressive program of discovery followed immediately—that is, as soon as counsel has accomplished sufficient discovery to support the motion—by a motion for summary judgment and then a motion for early, separate trial provides the best chance for disposing of a complex case on a question of one's own choosing.

II. Motions Made at Trial

There are three advantages to the use of written motions[80] submitted immediately before trial or during the first three days of trial. First, a

79. *Id.* at 166-69.

80. A motion must be in writing "unless made during a hearing or trial," Fed. R. Civ. P. 7(b)(1).

written motion will receive more careful consideration by the trial judge than will an oral motion that requests the same relief. The trial judge can take the motion home or have his law clerk review both it and the cited authorities, and the court will probably feel that there is less chance for error if the motion is accompanied by a clear, thorough, and persuasive supporting memorandum. The moving party's record for appeal is also well preserved when a matter is drawn to the court's attention by written motion.

Second, one's opponent must scramble to respond to a written motion at the precise time he is concerned with other things, such as the preparation of his opening statement or his witnesses. At the very least, the opponent may respond to the motion by limiting or partially withdrawing his proposed proof, or by permitting supplemental discovery by the moving party.

Finally, even if denied, the motion can strengthen the moving party's position for later motions made during trial. The preliminary motion educates the trial judge, alerts him to the presence and the details of a critical issue, and prepares him for a later motion to strike, motion to preclude or to exclude evidence, or motion for a directed verdict. A motion can also serve as the predicate for voir dire of a witness on the issue, followed by counsel's objections out of the jury's presence, or for a cautionary or limiting instruction from the court during the testimony or during the final charge to the jury.

A. *The Proof at Trial*

What evidence should be admitted at trial? A party's efforts to deal with this issue can be divided into two subjects: preclusion orders and exclusion orders. A preclusion order prevents a party from introducing evidence, calling witnesses, or mentioning certain facts because the party has violated a rule or order of the court or has failed to meet its obligations under the discovery rules. The typical example is the motion to preclude expert testimony, discussed below. In contrast, an exclusion order prevents the jury from receiving or hearing evidence because of its probable prejudicial effect or untrustworthy nature. Typical examples include motions to exclude hearsay evidence of certain technical or scientific proof. Preclusion orders are a function of the rules of procedure; exclusion orders are a function of the rules of evidence.

1. *Preclusion of Expert or Surprise Witnesses*

A recurring problem in complex civil actions is the practice of hiding all or part of expert testimony until the start of trial. Accordingly, the *Manual for Complex Litigation* recommends early disclosure of an expert's name, qualifications, and testimony.[81]

81. 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 2.60, at 112 (2d ed. 1979):

As soon as practical, each party should be required to disclose the name, qualifications and

It is, unfortunately, quite common in commercial litigation for one or both parties to retain their experts late in the case, or at least to disclose the fact that an expert will testify at trial at the last minute. The only course to be followed when counsel learns of such a move is to file a motion to preclude expert testimony.[82] Specifically, the motion should ask for an order precluding the party from offering the expert at trial, or, in the alternative, permitting the proposed expert to testify as an expert only after the moving party has had an opportunity to take his deposition and has a copy of the transcript with which to prepare cross-examination.

The following procedure should be followed to be certain that one is not surprised by an expert witness late in the preparation of a case.[83] First, early in the case, a set of interrogatories should be served upon the opponent, requesting all information concerning the opponent's experts permitted under Federal Rule of Civil Procedure 26(b)(4). A letter should then be sent to the opponent, requesting an opportunity in advance of trial to depose any and all expert witnesses that the opponent has or may retain. Counsel should telegraph his punch: the opponent should be told in the letter that a motion will be filed to preclude testimony of any expert that counsel is not given the opportunity to depose. This letter can later be attached to a motion to preclude expert testimony, if such a motion becomes necessary. A similar oral request can be made on the record during depositions of other witnesses. The final step is a motion to preclude expert testimony. The motion should include (1) a detailed statement of the facts (best presented in a sworn affidavit) that support the motion; (2) a memorandum of authorities showing the court that it has the power to take the seemingly harsh step of preventing an expert from testifying; (3) an explanation of the prejudice that will result to the moving party if the motion is not granted; (4) copies of the pretrial orders, discovery requests, or warnings of counsel that the opponent has failed to heed; and (5) a suggested form of the preclusion order.

The courts have recognized that cross-examination of expert witnesses is a very difficult task that frequently requires an opportunity to

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content of the testimony of each expert witness proposed to be called at the trial. This should be done in a written offer of proof. Disclosure of expert testimony is particularly desirable when there is reason to suspect that the witnesses will express plainly divergent views.

See also id. at ¶ 4.20 (content of pretrial disclosures of expert testimony or opinion evidence).

82. "Discovery of expert opinion must not be allowed to degenerate into a game of evasion." Voegeli v. Lewis, 568 F.2d 89, 97 (8th Cir. 1977).

83. FED. R. CIV. P. 26 (b)(4), as interpreted by the courts, requires adherence to a strict procedure when attempting to discover the content of the testimony of an expert: "When it is anticipated that the expert will be used as a witness at trial, and discovery is desired, a two-step procedure must be followed: First, written interrogatories may be served; Second, if additional discovery is desired, leave of the court must be obtained." Norfin, Inc. v. International Bus. Mach. Corp., 74 F.R.D. 529, 532 (D. Colo. 1977). *Accord, In re* IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39, 41 (N.D. Cal. 1977); United States v. International Bus. Mach. Corp., 72 F.R.D. 78, 81 (S.D.N.Y. 1976). A party does not waive the requirement of prior interrogatories by permitting the expert to testify at his deposition. Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 204 (N.D. Miss. 1972).

Many state provisions modeled on FED. R. CIV. P. 26 have a similar two-step procedure. *See, e.g.*, OHIO R. CIV. P. 26(B)(4); VA. SUP. CT. R. 4:1(b)(4).

depose the expert if it is to be conducted effectively. A party can "be precluded from calling an expert witness in trial if discovery called for is not provided sufficiently in advance to enable [a party] to prepare for effective cross-examination."[84] The fact that the information is available elsewhere is not a basis for defeating attempts to obtain discovery from an expert:

> The grounds of confusion and availability of information as reasons for denying discovery are neither persuasive nor applicable. The basic purpose of discovery is to prevent confusion, and it does not appear to me how full discovery, even discovery of an opinion of ultimate value, if permitted, could possibly result in confusion. It is the rare law suit in which there are not at least two versions of a single transaction or occurrence. The purpose of discovery is to permit each party to learn of the other party's version. That the versions may conflict creates a question for the trier of the fact, but hardly creates a basis to refuse discovery.
>
> From the very nature of the questions eliciting opinions sought to be answered, there is no basis to believe that the information sought to be elicited, since it is subjective in nature, might be obtained by the defendants except by the questions being answered by the only person, the expert, who has such information. It is to be noted in this regard that one of the express uses of depositions is that of cross-examination, Rule 26(d)(1), and it needs no citation of authority to say that an expert is the most difficult witness to cross-examine, particularly if one is unaware until trial of the substance of his testimony.[85]

The courts' distaste for "last minute" expert witnesses is well documented. For example, in one action in which the plaintiffs did not give notice of an expert until after the trial had begun, the court first ordered a one and one-half day recess so the defendants could depose the witness, then, dissatisfied with the results, refused to allow the expert to testify.[86] The court's reasoning was clear: "[I]t is plainly evident that the plaintiffs' dilemma is attributable entirely to a failure to properly prepare for trial although more than ample time was available. The consequences cannot be visited on defendants."[87] Similarly, in another action, the Fifth Circuit held that a trial court had erred when it denied the defendant's motions to withdraw his announcement of readiness for trial and to exclude expert testimony on certain damage issues after the plaintiff asserted, on the first day of trial, that his injuries were more complicated than he had disclosed during discovery and that he would substantiate those injuries through the testimony of an expert whose name had never been given to the defendant.[88] In commenting upon the reasons why the motion to exclude the

84. Wallace v. Shade Tobacco Growers Agric. Ass'n, Inc., 21 Fed. R. Serv. 2d 1130, 1132 (D. Mass. 1975).

85. United States v. 23.76 Acres of Land, 32 F.R.D. 593, 596 (D. Md. 1963).

86. Tabatchnick v. G.D. Searle & Co., 67 F.R.D. 49 (D.N.J. 1975).

87. *Id.* at 57.

88. Shelak v. White Motor Co., 581 F.2d 1155 (5th Cir. 1978). In responding to interrogatories filed more than one year before trial the plaintiff had indicated that only his back had been injured. At trial, however, plaintiff asserted that he had also suffered injury to his cardiovascular system and proposed to introduce an expert who would support his allegation.

expert testimony should have been granted, the court of appeals stated:

> Of course, it may well be possible in many cases for able counsel on an overnight basis to prepare and defend against last-minute claims by his adversary. Certainly, that sort of emergency litigation which could degenerate into "quick-draw hip shooting" is precisely what the discovery rules were designed to prevent.[89]

A similar result was reached in *Weiss v. Chrysler Motor Corp*,[90] a product liability action in which the court reversed a judgment for the defendant and remanded for new trial because the defendant had failed to inform the plaintiff of a change in its theory concerning the cause of the accident in which plaintiff was injured. In reaching this conclusion the court noted that plaintiff's knowledge of the information was irrelevant,[91] and that the defendant had a continuing obligation (that did not end when the trial began) to supplement its responses to interrogatories concerning the subject and substance of expert testimony.[92]

2. *Preclusion of Evidence in General*

The *Manual for Complex Litigation* recommends the use of preclusion orders in complex cases:

> The court should announce to counsel at an early stage in the pretrial proceedings of a complex case that, except for good cause appearing, (1) preclusion orders (refusing to allow a party to support or oppose certain claims or defenses or to offer certain evidence as sanctions for failure to make discovery) will be entered or other sanctions will be applied for failure or refusal to comply with discovery obligations and orders, and (2) the parties will also be precluded from offering in evidence or otherwise raising any legal or factual matters not included in the final pretrial brief.[93]

A number of courts have put teeth into discovery and final pretrial orders[94] by limiting testimony to the issues specified in the final pretrial order. One of the best opinions dealing with this subject is *Admiral Theatre Corp. v. Douglas Theatre Corp.*,[95] a decision of the Eighth Circuit that affirmed findings in the defendant's favor in an complex antitrust action that had been tried to a jury. The court make it clear that trial courts have the power to cull unimportant and potential confusing issues from a case:

> The district court exercised its discretion in limiting the scope of discovery and proof at trial to what the court perceived were the central issues. The district court must be free to use and control pretrial procedure so to insure

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89. *Id.* at 1159.

90. 515 F.2d 449 (2d Cir. 1975).

91. *Id.* at 456.

92. *Id.* at 457.

93. 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 1.11, at 18 (2d ed. 1979) (footnote omitted).

94. *See, e.g.*, S.D. OHIO R. 3.11; N.D. TEX. R. 8.1. Final pretrial orders are not used in all courts, but many courts, particularly federal district courts, do require their use.

95. 585 F.2d 877 (8th Cir. 1978).

the orderly administration of justice. *Link v. Wabash R.R.*, 291 F.2d 542, 547 (7th Cir. 1961), *aff'd*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). In his pretrial role, the district judge must at times assume the active part of "director of litigation * * * [free to] strip the controversy of nonessentials, and to mold it into such form as will make it possible to dispose of the contest properly with the least possible waste of time and expense." *Buffington v. Wood*, 351 F.2d 292, 298 (3d Cir. 1965), *quoting from* Committee on Pretrial Procedure to the Judicial Conference of the District of Columbia, *Report*, 4 Fed. Rules Serv.L.R. 47 (1941). The district court's discretionary power to limit discovery and proof at trial extends to complex litigation involving lengthy discovery procedures. *See Aviation Specialties, Inc. v. United Technologies Corp.*, *supra*, 568 F.2d at 1189-90; 1 Pt. 2 Moore's Federal Practice ¶ 2.40 (2d ed. 1978) (hereafter Manual for Complex Litigation). In the present complex litigation, we find no abuse of discretion by the district court. *Federal Deposit Ins. Corp. v. Glickman*, 450 F.2d 416, 419 (9th Cir. 1971); *Davis v. Duplantis*, 448 F.2d 918, 921 (5th Cir. 1971).[96]

The court also held that the trial court properly denied admission to forty-six trial exhibits on the ground that they were not called to the defendants' attention before trial:

> The plaintiffs object to the trial court's ruling which denied admission to 46 exhibits offered by the plaintiffs pertaining to specific licensing transactions. The court excluded the exhibits on two grounds: (1) they were not called to the attention of the defendants prior to trial, and (2) they could only be considered cumulative.
>
> At the pretrial conference on February 22, 1977, the district court informed the parties that the action would be processed under the procedures specified in the Manual for Complex Litigation and that pretrial filings of witness lists, exhibit lists, stipulations, proposed jury instructions and pretrial briefs would be required and strictly enforced. *See* Manual for Complex Litigation, *supra*, §§ 1.11, 3.30. Contrary to the pretrial orders of the court, the plaintiffs did not file their pretrial briefs or list of exhibits until the first day of trial on June 13, 1977. In addition, the 46 exhibits related to specific pictures regarding which the plaintiffs had made no complaint during pretrial discovery. As a result the defendants would have been prejudiced by admission of the exhibits in that they were unprepared to cross-examine or present their own evidence relating to these transactions. If it admitted these exhibits, the district court felt that to avoid prejudice to defendants it would have been compelled to grant a continuance to allow the defendants an opportunity for discovery on the new issues raised.
>
> In a complex case the trial court must manage the proceedings with a fair but firm hand to prevent excess expense and delay. *See Gaylord Shops, Inc. v. South Hills Shoppers' City, Inc.*, 33 F.R.D. 303, 305 (W.D.Pa. 1963); Manual for Complex Litigation, *supra*, § 1.10; Prettyman Report, Procedure in Anti-Trust and Other Protracted Cases, 13 F.R.D. 41, 65-66 (1951). The district court has the discretionary power to exclude exhibits not disclosed in compliance with its pretrial orders. *Kozar v. Chesapeake & O. Ry.*, 320 F.Supp. 335, 374 (W.D.Mich. 1970), *aff'd in part & vacated in part for other*

96. *Id* at 889. Other decisions supporting a strong, active role for the trial judge in complex cases include Geders v. United States, 425 U.S. 80, 86-87 (1976), and Paramount Film Distrib. Corp. v. Civil Center Theatre, Inc., 333 F.2d 358, 362 (10th Cir. 1964). The use of written motions helps the court structure the controversy, and, in many cases, reduces the complexities of a case.

reasons, 449 F.2d 1238 (6th Cir. 1971); Fed.R.Civ.P. 37(b)(2)(B); Manual for Complex Litigation, *supra*, §§ 3.30, 4.23; D.Neb.R. 25(B)(1). Its ruling will be overturned on appeal only if there is a clear abuse of its discretion.[97]

The court then upheld the exclusion of the testimony of a witness listed on the first day of trial:

> Similar to its discretionary power to exclude exhibits, the district court may refuse to permit the testimony of witnesses not listed prior to trial. *United States v. Pirnie*, 472 F.2d 712, 713 (8th Cir. 1973); Fed.R.Civ.P. 37(b)(2)(B); Moore's Federal Practice ¶ 16.16, at 1127 (2d ed. 1974); Manual for Complex Litigation, *supra*, §§ 3.30, 4.23; D.Neb.R. 25(B)(2)(D). The power of the trial court to exclude exhibits and witnesses not disclosed in compliance with its discovery and pretrial orders is essential to the judicial management of a complex case. When the district court's ruling is considered as part of the total procedural history of this case, we are convinced that the district court did not abuse its discretion in refusing to allow Corbino to testify.[98]

Finally, the trial court's ruling limiting discovery of proof of damages was upheld:

> Orders by a trial court limiting discovery are within the sound discretion of the court and will not be cause for reversal unless an abuse of discretion is shown. *Perel v. Vanderford*, 547 F.2d 278, 280 (5th Cir. 1977); *Huff v. N.D. Cass Co.*, 468 F.2d 172, 176-77 (5th Cir. 1972); *modified en banc*, 485 F.2d 710 (1973); *Barnard v. Wabash R.R.*, 208 F.2d 489, 498 (8th Cir. 1953). No such showing has been made here. In a complex case to keep discovery within bounds of reason and relevancy the court must establish limits of time and subject matter. Manual for Complex Litigation, *supra*, §§ 2.40, 4.30; Prettyman Report, Procedure in Anti-Trust and Other Protracted Cases, *supra*, 13 F.R.D. at 73-74.[99]

Other cases have considered similar issues and have held that the courts have the power to exercise control over pre-trial discovery and trial evidence. *Cine Forty-Second Street Theatre Corp. v. Allied Artist Picture Corp.*[100] was an antitrust action in which the court held that the trial court had properly ordered the preclusion of the plaintiff's proof of damages under Federal Rule of Civil Procedure 37, although the order was tantamount to dismissal of the claim. The plaintiff's belated compliance with an order requiring it to answer interrogatories was given little weight since, in the opinion of the court, a lenient remedy would encourage dilatory tactics.[101]

Similarly, in *Associated Press v. Cook*[102] the court affirmed summary

97. 585 F.2d at 896-97.

98. *Id.* at 897-98.

99. *Id.* at 898.

100. [1979-2] Trade Cas. ¶ 62,778 (2d Cir. 1979).

101. *Id.* at 78,469. The court also indicated that a written court order is not necessarily a prerequisite to the imposition of sanctions under Rule 37. *Id.* at 78,466 n.5. Counsel will find this ruling helpful since a court will often make on-the-record statements that a party should take certain actions in discovery, although the order is not put into a formal written order to be filed with the clerk. The party failing or refusing to accomplish the ordered actions should, nonetheless, be penalized.

102. 513 F.2d 1300, 1303 (10th Cir. 1975).

judgment in favor of the plaintiff in a breach of contract action when the final pretrial order contained an agreement of the parties " 'that the amounts claimed by the Plaintiff as shown by the Complaint and Plaintiff's exhibits are accurate and are the proper measure of damages to Plaintiff unless Defendant had a right to terminate the agreement.' " The court rejected the argument that summary judgment was improper because the alleged unconscionability of damages presented a genuine issue of material fact, holding that "parties are bound by their admissions and stipulations included in a pre-trial order."[103] And, in *Moore v. Tangipahoa Parish School Board*,[104] the court held that the defendants had waived the defenses of laches and the statute of limitations by not raising them in a pretrial memorandum or in the post-trial brief.

A more balanced approach was taken in *DeMarines v. KLM Royal Dutch Airlines*,[105] in which the court reversed a lower court's exclusion of the testimony of a physician whose report had not been provided to plaintiff in accordance with a pretrial order since it found little surprise or prejudice to plaintiff. The court considered five factors in determining whether the "drastic sanction"[106] of exclusion should be applied:

1. The prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
2. the ability of that party to cure the prejudice;
3. the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;
4. bad faith or willfulness in failing to comply with the court's order;[107] and
5. the practical importance of the evidence excluded.[108]

The Sixth Circuit reached a similar result in *Morelock v. NCR Corp.*,[109] an age discrimination action in which the plaintiffs entered into a stipulation that they were laid off due to lack of work within their vocation. The court held that this stipulation in the final pretrial order precluded evidence that they were laid off for any other reason: "A party is bound by what he stipulates. The above stipulation gives the reason why plaintiffs were laid off, namely, there was no work for senior techs. This stipulation in our opinion, should preclude the plaintiffs from claiming that they were laid off for any other reason."[110] A similar case is *Davis v. Marathon Oil Co.*,[111] an antitrust action in which the court upheld an order "refusing to permit the 'eleventh hour' witnesses to testify because their names had been furnished

103. *Id.*
104. 594 F.2d 489, 495 (5th Cir. 1979).
105. 580 F.2d 1193, 1201-02 (3d Cir. 1978).
106. *Id.* at 1202.
107. *Id.* at 1201-02, *citing* Meyers v. Pennypack Woods, 559 F.2d 894, 904 (3d Cir. 1977).
108. 580 F.2d at 1202.
109. 586 F.2d 1096 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 1995 (1979).
110. 586 F.2d at 1107.
111. 528 F.2d 395 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

in supplemental answers to interrogatories only three days before trial was scheduled to begin."[112] The court noted:

> In the short time afforded, there was virtually no way for Marathon to prepare adequately to respond to the testimony of the surprise witnesses. Unfair surprise of this sort is contrary to the policy of the federal rules, which sanction extensive discovery. If appellant had refused to answer the interrogatory in question, Marathon could have obtained an order requiring appellant to answer under Rule 37(a). Then, if appellant still refused to answer, or answered incompletely, Rule 37(b) provides that the court could issue '[a]n order . . . prohibiting . . . [the disobedient party] from introducing designated matters in evidence. . . .' Since Marathon did not know that the original answer was incomplete, it did not move for an order under Rule 37(b) to compel appellant to complete it. Even though Rule 37(b) is not directly applicable, we hold that the trial judge properly exercised discretion in regard to the surprise witnesses, and that any other decision would be contrary to the policy of Rule 37.[113]

The court also pointed out that "[a] trial court has broad discretion in its choice of sanctions for failure to comply with discovery orders and, in appropriate circumstances, it may even dismiss the case."[114] *National Hockey League v. Metropolitan Hockey Club, Inc.*,[115] a case decided after *Davis*, upheld the dismissal of an action for failure to timely answer interrogatories. Similarly, in *Monogram Models, Inc. v. Industro Motive Corp.*,[116] a copyright infringement action, the court held that there was no error in granting a default judgment in favor of the plaintiff on the issue of damages after the defendant failed to comply with the trial court's order to answer six previously unanswered interrogatories within five days.

However, in *Mains v. United States*[117] the court held that taxpayers were not precluded from relying on a section of the Internal Revenue Code by their statement of the issues in the final pretrial order when (1) there was nothing in the final pretrial order "which limits the taxpayers to any particular section of the Internal Revenue Code,"[118] and (2) the issue had been tried by consent of the parties.[119] To exclude evidence for failure to abide by a final pretrial order, therefore, the party seeking exclusion must

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112. 528 F.2d at 403.

113. *Id* at 404.

114. *Id* at 403. *See also* International Bus. Mach. Corp. v. United States, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (upholding an order of civil contempt and a fine of $150,000 per day for refusal to comply with a pretrial discovery order).

115. 427 U.S. 639 (1976). *See also* VonBrimer v. Whirlpool Corp., 536 F.2d 838, 842-44 (9th Cir. 1976) (upholding the exclusion of documents produced on the eve of trial).

116. 492 F.2d 1281, 1287-1288 (6th Cir.), *cert. denied*, 419 U.S. 843 (1974).

117. 508 F.2d 1251, 1259 (6th Cir. 1975), *cert. denied*, 99 S. Ct. 569 (1978). *See also* Perfection Cobey Co. v. City Tank Corp., 597 F.2d 419, 421 (4th Cir. 1979). *In re* Intercontinental Properties Management, S.A., 604 F.2d 254, 259 (4th Cir. 1979), held that a trial court may hold a party "estopped by its litigation conduct to have an issue considered by the trier of fact" under FED. R. CIV. P. 16 when the "party has failed to identify an issue for inclusion in a pretrial order while under a clear duty to do so."

118. 508 F.2d at 1258.

119. *Id.* at 1258-59. *See* FED. R. CIV. P. 15(b).

raise the issue of a violation of a specific provision of the order. In order to make a successful motion on this subject, it is also essential that counsel serve early discovery requests (request for production of documents and interrogatories) and follow these requests with a clear pretrial order in which the parties are required to list witnesses and trial exhibits by a specific date. If a local rule or order does not require a final pretrial order, counsel for plaintiff or defendant may propose to the court (often by informal oral request in pretrial conferences) that certain requirements be imposed by court order.[120]

The use of final pretrial orders to determine issues and set filing dates avoids reliance on orders *in limine*. This practice is advisable since, as *Sperberg v. Goodyear Tire & Rubber Co.*[121] points out, "[o]rders *in limine* which exclude broad categories of evidence should rarely be employed."[122] Of course, the use of orders *in limine* cannot be eliminated completely since the very mention of some evidence may prejudice the jury.[123]

3. *Exclusion of Evidence*

Motions to exclude evidence have a twofold purpose. They are, of course, directed at preventing the admission of evidence that should be excluded under one or more of the rules of evidence. More importantly, motions to exclude evidence attempt to prevent the jury from hearing evidence that is extremely harmful to one's case by instructing counsel and witnesses that they may not mention a particular subject. A written motion naturally performs this function better than an oral objection imposed at trial.

In contrast to preclusion motions, the procedures for excluding

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120. For example, the author frequently requests the trial judge to enter an order (1) setting a discovery cutoff date, (2) requiring that the parties simultaneously exchange witness lists on or before a specified date, and (3) requiring that the parties simultaneously exchange books of trial exhibits on or before a specified date.

A discovery cutoff date is not the date beyond which no discovery may be had by any party. Rather, it is the date beyond which neither party can force the other to respond to or to engage in discovery. After the discovery cutoff date the court will not intervene in discovery disputes. Discovery beyond the cutoff date may be had by the parties' mutual cooperation and agreement. For example, since experts are often retained late in the progress of a case, the author has made agreements with opponents in which each side agrees to permit a deposition of its expert witness after the discovery cutoff date, but no depositions of the clients or other fact witnesses are conducted. *See also In re* Airport Car Rental Antitrust Litigation, [1979-2] Trade Cas. ¶62,746 (N.D. Cal. 1979), which granted the defendants' motion for a pretrial order with respect to burden of proof of damages in an antitrust action. The relevant allegation was that defendants excluded other automobile rental companies from the airport automobile rental market at a number of airports. The defendants' suggested order, approved by the court, required the plaintiff to present evidence at trial from which the jury could conclude that there was a causal connection between the allegedly unlawful acts of defendants and plaintiff's claimed exclusion from each airport. An order granting such a motion would provide an excellent basis for a later motion to preclude proof of damages, on the ground that the plaintiff failed to make the showing required by the pretrial order.

121. 519 F.2d 708 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

122. *Id.* at 712.

123. *See* text accompanying notes 175-76 *infra*, dealing with prior consent decrees, and notes 146-52 *infra*, dealing with hearsay evidence.

evidence are spelled out in the Federal Rule of Evidence.[124] Several provisions in the Rules lend support to a pretrial motion to exclude evidence, or to hold a hearing concerning the admissibility of evidence out of the presence of the jury. Rule 103(c) provides that: "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." Rule 104, which deals with preliminary questions, also provides that hearings shall be conducted out of the hearing of the jury "when the interests of justice require," which will certainly be the case when the moving party is claiming that evidence would prejudice or confuse the jury. Finally, Rule 105 provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Counsel, of course, has a better chance of obtaining such an instruction if the request is made through a written motion.

In addition, relevant evidence may be excluded under Federal Rule of Evidence 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This provision forms an excellent basis for a motion to exclude evidence which, although relevant, could prejudice or confuse the jury. The range of evidence that can be excluded under this Rule is almost limitless, and the courts should exclude such evidence if the moving party can show both risk of prejudice and the cumulative nature of the evidence.[125] Cumulation can be proved before trial by reference to deposition testimony or to specific exhibits in the parties' list of trial exhibits which would adequately establish a point.

Specific evidentiary questions are discussed below.

Damages. A theory of damages must be grounded soundly in the evidence presented at trial and must not be speculative. Yet, because complex civil litigation often requires proof of loss of profits or market share, a plaintiff may attempt to establish damages through speculation and conjecture. A defendant need not resign himself to permitting these tactics.

The types of evidence likely to be used to prove damages were summarized in *Flintkote Co. v. Lysfjord,*[126] an antitrust action:

124. The early resolution of evidentiary issues of controlling importance is encouraged by the *Manual for Complex Litigation. See* 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION, pt. 2, ¶ 1.80, at 95-96 (2d ed. 1979). *But see In re* Beef Indus. Antitrust Litigation, 600 F.2d 1148, 1170 (5th Cir. 1979).

125. If the moving party can show only the former factor, risk of prejudice, and not the latter, it may be appropriate for the court to admit the evidence (since it is not cumulative and hence would have some probative value) and give the jury a cautionary or limiting instruction to cure any possible prejudice.

126. 246 F.2d 368 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957).

> There are three chief types of evidence which the decisions have approved as the basis for the award of damages. (1) Business records of the plaintiff or his predecessor before the conspiracy arose. (2) Business records of comparative but unrestricted enterprises during the period in question. (3) Expert opinion based on items (1) and (2).[127]

Even these types of evidence can be challenged. First, the accuracy or completeness of the business records relied upon by the plaintiff may be challenged. A successful challenge will usually require cross-examination of the plaintiff's witness and, since the goal is proving the unreliability of the records rather than their lack of authenticity, testimony of defendant's own expert. Second, the qualifications of the plaintiff's expert may be challenged.[128] Because a party's self-serving testimony is more damaging when cloaked in the mantle of expert testimony, a pretrial motion, seeking to limit the plaintiff to the views he could express as a layman, should be filed whenever the plaintiff intends to testify personally as an expert. Counsel must be prepared to argue such a motion vigorously, since the qualifications of an expert are within the sound discretion of the court.[129] As the Ninth Circuit has noted, "[T]he trial court is vested with broad discretion concerning the admissibility or exclusion of expert testimony and the court's action is to be sustained unless shown to be manifestly erroneous."[130]

The measure of damages and the considerations that apply will vary depending upon the nature of the action. There are three traditional measures of damages in an antitrust action:[131] (1) the before and after approach (which compares a plaintiff's profit or loss in two distinct time periods, using his own business and its performance to calculate damages); (2) the yardstick theory (which compares the plaintiff's profits during the period in which the antitrust violations occurred to those of a similar company that was not adversely affected by the antitrust violations); and (3) the market share theory (which establishes the market share lost by plaintiff in dollars and multiplies the dollar volume by the plaintiff's profit

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127. 246 F.2d at 392 (footnotes omitted).

128. Consider the following statement from California Steel & Tube v. Kaiser Steel Corp., 469 F. Supp. 265, 269 (C.D. Cal. 1979):

> Dr. Marshall is an economist, not an accountant, and therefore, is not qualified to analyze and synthesize accounting data from the books and records of the defendant, which accounting data are essential to any sort of expert testimony on predatory pricing below marginal cost.

129. Salem v. United States Lines Co., 370 U.S. 31, 35 (1962) ("Furthermore, the trial judge has broad discretion in the matter of the admission of exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous."). This principle was recently restated in Hamling v. United States, 418 U.S. 87, 108 (1974): "[T]he District Court has wide discretion in its determination to admit or exclude testimony." *Accord*, United States v. Snow, 552 F.2d 165, 168 (6th Cir.), *cert. denied*, 434 U.S. 970 (1977). United States v. Barker, 553 F.2d 1013, 1024 (6th Cir. 1977).

130. Reno-West Coast Dist. Co. v. Mead Corp., [1979-1] Trade Cas. ¶ 62,544 at 77,152 (9th Cir.), *cert. denied*, [1979] TRADE REG. REP. (CCH) ¶ 60,021 (1979).

131. *See generally* Hoyt, *Comprehensive Models for Assessing Lost Profits to Antitrust Plantiffs*, 60 MINN. L. REV. 1233 (1976). As to damages to cases under the Sherman Act, 15 U.S.C. § 2 (1976), see Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 296-97 (2d Cir. 1979).

margin). All of these theories are subject to attack on the ground that they use records or assumptions that are speculative and without a basis in the evidence.[132]

There are at least two measures of damages in securities fraud actions.[133] For the defrauded seller, the measure is the difference between what the seller received and what he would have received had there been no fraudulent conduct.[134] There is also a measure of damages similar to the traditional "out-of-pocket" rule, that is, rescissionary or restitutional damages.[135] This theory is based upon the policy that: "It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them."[136] The standard of damages has also been stated as disgorgement of profits.[137]

Complex commercial cases other than antitrust and securities actions will also benefit from the close examination and exclusion of testimony based upon unsupported or speculative assumptions:

> We note, however, that the claims of both Goldgar and Buckeye as to both liability and damages are infested with speculation about the potential profitability of an office building without any profit history in Atlanta's admittedly unstable real estate market in 1975 which has not been fully developed on the record presented to the Court. Expert testimony on this issue which serves only to limit the range of the jury's speculation is inadmissible, *see American Air Filter Co. v. McNichol*, 527 F.2d 1297 (3d

132. *See, e.g.*, Kaplan v. Burroughs Corp., 426 F. Supp. 1328, 1334 (N.D. Cal. 1977) (antitrust action in which the court stated that the plaintiff "sought to fill the gap in specific factual evidence by so-called expert opinion. *This was not in fact opinion evidence but consisted of statements which were unsupported by factual testimony* and were inflationary, inaccurate, imaginative, and inconsistent." (emphasis in original)); Battista v. Lebanon Trotting Ass'n, 538 F.2d 111, 119 (6th Cir. 1976) (contract action in which the court stated that it was "wholely [*sic*] speculative for Battista to testify here that he would have realized an increase of annual profits of more than 300% of the 1967 contract if the contract had not been repudiated"). Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 553 F.2d 510, 517 (10th Cir. 1976) ("We are mindful that computations by experts cannot be based on conjecture or be unsupported by the record."); Yoder Brothers, Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1369-72 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977) (antitrust action); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975) (antitrust action stating that "plaintiff's projections fail to account for significant factors bearing upon its diminished market share").

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), was an unsuccessful treble damage action by a wholesale liquor distributor against distilleries and others. The court there examined a plaintiff's proof of damages and found it insufficient because it was based on unwarranted assumptions and was therefore speculative. 416 F.2d at 85-87. The court concluded that "[p]laintiff's charts are an 'array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it.' " 416 F.2d at 87, *quoting* Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 912 (2d Cir. 1962). *Accord*, Gray v. Shell Oil Co., 469 F.2d 742, 749-50 (9th Cir. 1972).

133. *See generally* 4 A. BROMBERG, SECURITIES FRAUD & COMMODITIES FRAUD § 9.1 (1975); Comment, *Private Remedies Available Under Rule 10b-5*, 20 SW. L.J. 620 (1966).

134. Nickels v. Koehler Management Corp., 541 F.2d 611, 617 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). *See also* Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, 495 F.2d 228, 242 (2d Cir. 1974).

135. *See* Reder, *Measuring Buyer's Damages in 10b-5 Cases*, 31 BUS. LAW. 1839 (1976).

136. Nickels v. Koehler Management Corp., 541 F.2d 611, 618 (6th Cir. 1976), *cert denied*, 429 U.S. 1074 (1977), *quoting* the leading case of Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). *See also* Myzel v. Fields, 386 F.2d 718, 741-47 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

137. Ohio Drill & Tool Co. v. Johnson, 498 F.2d 186, 190 (6th Cir. 1974).

Cir. 1975); *see also Weinglass v. Gibson*, 304 Pa. 203, 155 A. 439 (1931); *Western Show v. Mix*, 308 Pa. 215, 162 A. 667 (1932); *Eazor Express, Inc. v. Int'l. Bhd. of Teamsters*, 520 F.2d 951 (3d Cir. 1975); *McBrayer v. Teckla, Inc.*, 496 F.2d 122 (5th Cir. 1974); *Neville Chemical Co. v. Union Carbide Co.*, 422 F.2d 1205, 1225-27 (3d Cir. 1970), *cert. den.* 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970).[138]

In one very complex breach of contract and breach of warranty action over a contract to manufacture and deliver ninety-nine jet air planes, the Fifth Circuit explained that trial judges must closely examine an expert's testimony to prevent errors or unsupported assumptions from being placed before the jury since "some telling errors may become virtually unreviewable once the jury has returned its verdict."[139]

> The District Court must do more than merely weigh the probative value of an expert's testimony considered as a whole. Where practical, a trial judge should exclude particular assumptions or other aspects of an expert's testimony which considered individually do not meet the "minimum of probative value." *Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra*, 297 F.2d at 912. This more detailed scrutiny is necessary because some telling errors may become virtually unreviewable once the jury has returned its verdict.
>
> In this case, for example, Wemple should have considered whether Eastern's estimated loss of profits was reduced by the cost of financing those planes which were purchased rather than leased. McDonnell argues that this was an error which overstated the airline's lost profits by $1.6 million. However, because Eastern was awarded only 85 per cent of the damages estimated by Wemple, it cannot be said that McDonnell's cross-examination did not bring this point home to the jury. In complicated or technical cases, therefore, an expert's testimony should be cleansed of unsupportable assumptions or clear errors which have less than the minimum of probative value. This would reduce the possibility of a confused jury and an arbitrary verdict.[140]

Similarly the Sixth Circuit has stated that the courts should prevent "a projection of statistical data so attenuated as to be *reductio ad absurdum*, thus allowing damages to be ballooned beyond all rational experience."[141] Counsel can make a good record of such defects in his opponent's case by attaching excerpts from the deposition of the opponent's own experts to the motion.

Hearsay. Because complex civil actions, particularly antitrust and securities fraud actions, often turn on statements made by the defendant or his associates, hearsay is a key consideration. Discovery, particularly depositions, will often disclose that testimony of a witness is based on

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138. Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 468 F. Supp. 656, 669 (W.D. Pa. 1979).

139. Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 1000 (5th Cir. 1976) (footnotes omitted).

140. *Id.*

141. Morvant v. Construction Aggregates Corp., 570 F.2d 626, 632 n.5 (6th Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

hearsay, and the defendant should be certain to file written motions to exclude the hearsay. Hearsay testimony admitted under the co-conspirator exception is one type of evidence that is very harmful and should always be made the subject of a written motion to exclude the evidence. "Chain hearsay"—that is, evidence in which the witness testifies that he was told by Declarant A that Declarant B had said such and such—can also be very damaging, and should be excluded by written motion so one's opponent cannot "inadvertently" bring it to the jury's attention. Testimony concerning what has been told a witness, about, for example, a conspiracy to put someone out of business or to fix the price of a commodity, can be devastating. Testimony of this nature is precisely the abuse against which the hearsay rule was designed to guard since there is no way to clarify the statements through cross-examination.[142]

There are a number of bases for challenging hearsay testimony of the type that is likely to be troublesome in complex civil actions.[143] For example, a chain of hearsay is not admissible unless every statement in the chain is admissible under an exception to the hearsay rule.[144] With respect to the co-conspirator exception to the hearsay rule, counsel can also argue that there is insufficient preliminary proof of a conspiracy to justify admission, or that the statement proffered was not made by a co-conspirator or was not made in furtherance of the conspiracy.[145]

The co-conspirator exception is worthy of more extensive treatment since it will frequently be raised in complex civil actions. Most of the cases dealing with the co-conspirator exception to the hearsay rule are criminal cases,[146] which have established numerous rules limiting its applicability. First, the preliminary question of admissibility of such statements is for the court, not the jury.[147] Second, the statement may not be introduced unless

142. *See, e.g.*, Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 859 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978), an antitrust action in which the court upheld the rejection of the following statement:

> The evidence offered but rejected was testimony by Mr. Moise Silber. Silber would have testified that he was told by Mr. Roy Sherwin, a former salesman for American, that Sherwin and Mr. Buck, the executive vice-president of American, had engaged in several conversations over the years during the course of which Buck had stated that American was going to lower the prices on gin and vodka in California, run the rectifiers out of business and then increase prices.

143. *See generally* Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 984-88 (1959).

144. FED. R. EVID. 805.

145. FED. R. EVID. 801(d)(2) provides that a statement is not hearsay if "the statement is offered against the party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

146. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917), a case decided prior to the enactment of the Federal Rules of Evidence, and United States v. Williams, 435 F.2d 642, 645 (9th Cir. 1970), *cert. denied*, 401 U.S. 995 (1971), a case decided contemporaneously with enactment of the Rules, both recognized that the co-conspirator exception is based upon the law of partnership and upon the principle that each member of a scheme is constituted the agent of all the members of the scheme, so that the act or declaration of one member in furtherance of the common object is the act of every member and is therefore admissible against them.

147. United States v. Mitchell, 556 F.2d 371, 377 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977) (collecting cases). *Cf.* FED. R. EVID. 104 (a), (b). United States v. Enright, 579 F.2d 980, 984 (6th Cir.

a sufficient showing is first made, independent of the statement sought to be introduced, that a conspiracy exists.[148] Third, if the declarant's statement is no more than his account of the facts of the defendant's supposed past activities, amounting to a narration of events or an accusation of the defendant, it is not within the co-conspirator exception because it is not "in furtherance of the conspiracy" under either Federal Rule of Evidence 801(d)(2)(E) or under the traditional statement of the exception.[149] In addition, the statement is not made "in furtherance of the conspiracy" if it is a statement made after the termination or culmination of a common plan or scheme—for example, a statement made after the conspiracy has ended.[150] However, the scope of the conspiracy alleged in the indictment does not limit the application of the co-conspirator exception, and the co-conspirator exception can be used even though the indictment does not charge a conspiracy[151] and even if the declarations sought to be introduced are declarations of co-conspirators who are not defendants in the case on trial.[152]

A number of antitrust actions have considered the applicability of these principles to civil cases. The leading case is *Flintkote Co. v. Lysfjord*,[153] which contains an excellent discussion of the law and of the policy bases for excluding hearsay without an adequate foundation. The following excerpt from *Flintkote* is, perhaps, the best analysis of the co-conspirator exception that has ever been written:

> We start with the major premise that all statements [by the conspirators] were hearsay. In fact, when Waldron or Lysfjord told the jury what Ragland said Krause had told him, we have hearsay placed upon hearsay; and when

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1978), held that FED. R. EVID. 104 (a), not 104(b), governs the admissibility of a co-conspirator's statements. *See also* United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979).

148. This requirement has been phrased in various ways. United States v. Spanos, 462 F.2d 1012, 1014 (9th Cir. 1972), held that there must be "substantial independent evidence of the conspiracy charged" before the testimony may be admitted. *See also* United States v. Nixon, 418 U.S. 683, 701 n.14 (1974) ("As a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury."). The traditional rule was that the person seeking admission of the hearsay statement of a co-conspirator must make out a prima facie case of the conspiracy and of the defendant's connection with it. United States v. Enright, 579 F.2d 980, 983 (6th Cir. 1978) (collecting cases). However, the First Circuit decided that the prima facie test was no longer valid in light of FED. R. EVID. 104(a), *see* United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977), and held that the district court must find, by a preponderance of the evidence, that a conspiracy existed and the defendant was connected with it. *Petrozziello* stated that "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible." *Id.* at 23. The Court of Appeals for the Sixth Circuit adopted the *Petrozziello* standard in *Enright*, 579 F.2d at 986, and recognized that its earlier statements of the prima facie rule should not to be followed. *Id.* at 983.

149. *See, e.g.*, United States v. Harrell, 436 F.2d 606, 613 (5th Cir. 1970), *aff'd after remand*, 458 F.2d 655 (5th Cir.), *cert. denied*, 409 U.S. 846 (1972); Salazar v. United States, 405 F.2d 74 (9th Cir. 1968); United States v. Birnbaum, 337 F.2d 490, 494-95 (2d Cir. 1964).

150. *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 81 (1970); Wong Sun v. United States, 371 U.S. 471, 490-91 (1963); United States v. Mitchell, 556 F.2d 371, 377 n.6 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977); Kay v. United States, 421 F.2d 1007, 1010 (9th Cir. 1970).

151. United States v. Mitchell, 556 F.2d 371, 377 n.6 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977).

152. United States v. Nixon, 418 U.S. 683, 701 (1974).

153. 246 F.2d 368, 382-87 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

the plaintiffs testified that Ragland told them what Krause or Newport or Howard had said at a meeting, concerning which there had been no proper foundation laid as to whether Ragland was present, we have hearsay placed upon hearsay placed upon hearsay.

It is true that there are so many exceptions to the hearsay rule that much of the evidence which decides law suits is made up of hearsay evidence. But this does not eliminate the hearsay rule as a vital and important rule of evidence, nor permit us, or the lower court, to open wide the floodgates to any evidence, in total disregard of the rule.

One of the very best reasons for the hearsay objection is to prevent the presentation of self-serving statements. The instant case is a perfect example of the reason and of the necessity for the rule. Without in any way passing upon or inferring as to the credibility of witnesses who testified, we here have two of the three most interested parties to the law suit ascribing vital culpatory statements to Krause; to Newport; to Howard; to Baymiller; to Thompson; to Lewis and to Ragland, each one of whom (except Newport who did not testify) denies both any recollection of the specific alleged statements, and of the fact sought to be proved by the hearsay statement.

But the hearsay rule serves another more important purpose. It requires the person asserting a fact to be present in the courtroom, and to subject himself to the best method yet devised for a determination of the truth of a fact; cross-examination.[154]

The court stated that evidence of this type could only be offered under one of the exceptions to the hearsay rule:

A number of theories exist under which the alleged statements of Ragland might have been offered against the defendant Flintkote, as exceptions to the hearsay rule: (1) As an admission of a party's authorized agent; (2) as a statement of a co-conspirator; (3) as a statement made as part of the res gestae.[155]

The court then held that the plaintiffs had not offered sufficient proof to make the statements admissible under any of these exceptions,[156] and that the evidence was obviously prejudicial to the jury:

What was the effect of the erroneous admission of this evidence?

Here we have testimony introduced which goes to the very heart of plaintiff's cause of action and to defendant's defense. Why did Flintkote terminate the contract? No reason was placed in writing. The only evidence (other than the bare refusal to sell, which was equivocal) were the conversations. Of these a reading of the record persuasively demonstrates that Ragland's alleged statements were by far the most significant and the most damaging to defendant's cause. They spelled out in clear perspective the nature of the conspiracy and brought the events home to the jury with the dramatic and incisive impact that only admissions can produce. This was defendant's own former employee outlining the unlawful scheme. The full effect of this evidence on the jurors' minds cannot be measured with precision. To deny that it influenced the jury's verdict in a material manner is to ignore reality.[157]

154. 246 F.2d at 382-83 (footnotes omitted).

155. *Id.* at 383.

156. *Id.* at 383, 385.

157. *Id.* at 386.

The court stated that the analysis under the co-conspirator's exception was "one of the law of agency, not of the law of evidence."[158] The question of agency law is the question whether the admissions were made by the agent within the scope of his authority, and an analysis of the person's position and agency relationship should properly be undertaken by the trial court as a predicate or foundation for the admissibility of the co-conspirator's statements.[159]

These lengthy quotations from *Flintkote* show the problems and the type of analyses a trial court must undertake when confronted with a request for admission of hearsay evidence. Indeed, the *Flintkote* court recognized the necessity of a thorough consideration of these issues when it stated that "the court was pressed for immediate answers on involved procedural and evidentiary points."[160] This is always the situation in a conspiracy action under the federal antitrust or securities laws when a request for admission of co-conspirators' statements is made. The court should, therefore, have the benefit of a written motion by the party who seeks to exclude the statements. Without such a motion, the party affected by the statements may simply go to the gallows arguing about the width of the rope that hanged him.

Another situation in which a written motion to exclude evidence should be made is illustrated by *South-East Coal Co. v. Consolidated Coal Co.*,[161] in which the court held that there was no error in the introduction of parts of the defendant's answers to written interrogatories and exerpts from speeches and other statements made by union officials that were attached to the interrogatories:

> The general rule is that this type of evidence is admissible, however, subject to exclusion if no prima facie case of the existence of the conspiracy is established. The question of conditional admissibility is for the trial judge to determine. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). There is no error in conditionally admitting the statements before a prima facie case was established by independent evidence if subsequently such a case is proven, because the trial judge has wide discretion over the order of proof. Pennington v. United Mine Workers of America, 325 F.2d 804, 817 (6th Cir. 1963), reversed on other grounds, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Flintkote Company v. Lysfjord, 246 F.2d 368, 378 (9th Cir. 1957), cert. denied, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46. At the close of plaintiff's case there had been established by independent or disassociated evidence a prima facie case, thus the requirement for having conditionally admitted the statement was met.[162]

Conditional admissibility is not a good practice; once the hearsay

158. *Id.* at 384.

159. *Id* at 384-85. This is the type question that is properly analyzed under FED. R. EVID. 104(a). *See* text following note 124 *supra*.

160. 246 F.2d at 385.

161. 434 F.2d 767, 779 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

162. 434 F.2d at 788. *See also* United States v. Mitchell, 556 F.2d 371, 377 (6th Cir. 1977), which reaches the same conclusion. *But see* the Sixth Circuit's decision in note 148 *supra*.

statements are admitted and the jury has heard them, a simple instruction by the court to ignore them, given at a later time in what may be a lengthy trial, will not erase them from the jury's mind and may serve to highlight them by calling to the jury's attention the very statements that it is told to ignore. It is much better to ask the judge to consider the issue before trial by filing a written pretrial motion, forcing the opponent to substantiate his assertion that a conspiracy will be proven, and thereby preventing the conditional admission of statements that, more likely than not, would have been admitted had the issue first been raised through an oral objection at trial. As the Third Circuit noted in *Baughman v. Cooper-Jarret, Inc.*,[163] an action in which hearsay was found to be admissible against one defendant but not others "the preferred course [is] to give a limiting instruction that [the defendant's] statements [are] not admissible to show the participation of [other defendants] in the conspiracy."[164] A limiting instruction of this sort is exactly the type of relief that can be obtained by a written pretrial motion with an attached deposition transcript of the damaging statements sought to be limited or excluded.

A party should also remember that the use of written motions can prevent the dilemma presented by cases like *Coughlin v. Capitol Cement Co.*,[165] in which the court of appeals found error in the admission of certain hearsay evidence but affirmed since, in its opinion, the error was nonprejudicial.[166] Counsel has a better chance of having the evidence excluded if a written pretrial motion is used. Once the evidence is admitted, however, no one can tell what effect it might have had on the minds of the jurors, and appellate courts are apt to uphold a judgment by finding that the wrongfully admitted evidence caused no harm.

In summary, these cases illustrate the desirability of using a pretrial motion to exclude hearsay declarations. It is, of course, possible to argue that a party's failure to prove the condition necessary for admission of particular evidence was so prejudicial that a mistrial should be granted,[167] but this tactic should be reserved as a last ditch effort.[168] Failure to make a written motion for exclusion of hearsay evidence may well result in the entry of a judgment that is supported by nothing more than "back-fence gossip."

Consent Decrees. Another type of evidence that may have serious

163. 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976).

164. *Id.* at 533.

165. [1978-1] Trade Cas. ¶ 61,957 (5th Cir. 1978).

166. "The improper admission of hearsay testimony which is merely cumulative on matters shown by other admissible evidence is harmless error." *Id.* at 74,059.

167. "Cautionary instructions to the jury might not suffice to cure the resulting prejudice to the defendant. In such instances it may be necessary for the trial judge to grant a defendant's request for a mistrial." United States v. Continental Group, Inc., 603 F.2d 444, 456 (3d Cir. 1979) (citation omitted).

168. The likelihood of a court granting the extreme remedy of a mistrial is, as a practical matter, slim. Only the clearest examples of irreconcilable prejudice are likely to be dealt with in this fashion, particularly if the motion comes at the end of a lengthy trial, as is apt to be the case in complex civil actions.

adverse effects if introduced in a jury action is evidence concerning consent decrees or alleged violations of consent decrees or similar agreements reached with a governmental agency. When a plaintiff includes such evidence in its list of trial exhibits, a motion to strike the exhibit and to exclude all evidence of the consent decree should immediately be filed.

Control Data Corp. v. International Business Machine Corp.[169] is an excellent example of this practice. In that case defendant moved to strike all references to two prior decrees entered against the defendant from the pleadings and also to prevent plaintiff's counsel from mentioning the decrees during the trial or introducing them into evidence. The court granted the motion, stating that consent decrees under section 5 of the Clayton Act,[170] like recitals of nolo contendere pleas entered in previous criminal cases, were not relevant:

> There are a number of decided cases striking from a complaint in a treble damage action brought under the Clayton Act recitals of nolo contendere pleas entered in previous criminal cases. The holdings are quite uniform that such allegations must be stricken. It is said that these pleas are the equivalent of consent decrees under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a).
>
> It follows that a consent judgment whether it be in a civil case or a nolo plea in a criminal case, or any evidence thereof, is not admissible in a treble damage action and can have no real purpose except to attempt to prejudice a defendant before a jury. The issue is whether IBM, within the period of the applicable statute of limitations, has violated the antitrust laws, not whether it previously has been found guilty thereof (1935 decree) or has consented to a decree (1956). It can in truth be stated that at a trial before a jury, reference to a prior decree is for practical purposes nearly the equivalent of the prima facie evidence rule so far as informing the jury that IBM has previously been in trouble with the government.[171]

The court struck all references to the consent decree from the complaint, dismissed that part of the action that was premised upon a violation of the prior consent decree, and ordered that the consent decrees "not be admitted in evidence at trial."[172]

Control Data and similar cases are based on the principle that the United States alone speaks for the public interest, and that since the public interest is affected when a consent decree is violated, only the United States can bring an action alleging violation of a consent decree.[173] The result is

169. 306 F. Supp. 839 (D. Minn. 1969), *aff'd per curiam*, 430 F.2d 1277 (8th Cir. 1970).

170. 15 U.S.C. § 16(a) (1976).

171. 306 F. Supp. at 844 (citations omitted).

172. 306 F. Supp. at 849.

173. Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., 269 U.S. 42, 48-49 (1925). The Second Circuit has stated that a consent decree is comparable to an order of the National Labor Relations Board since the complaining party cannot enforce the order which is entered against the defendant. United States v. ASCAP, 341 F.2d 1003, 1008 (2d Cir. 1965). In the court's language:

> [T]he government is the sole proper party to seek enforcement of government antitrust decrees. . . . [T]he fact that the court retains jurisdiction [in order to modify a decree] in an antitrust action does not mean, unless the decree should expressly provide otherwise, that persons affected by the judgment, but not parties to it, can invoke the court's jurisdiction to alter or enforce the terms of the decree.

Id. See also Fuller v. Branch County Rd. Comm'n, 520 F.2d 307, 309 (6th Cir. 1975).

that a plaintiff's claim must rest upon an independent violation of the antitrust laws, not on a consent decree or the violation of a consent decree.[174]

In arguing for the exclusion of consent decrees or similar orders, counsel may rely on the various Federal Rules of Evidence relating to relevance and admissibility of evidence of prior conduct.[175] In addition, counsel would be well-advised to cite *Greyhound Computer Corp. v. International Business Machines Corp.*,[176] a case in which the court held that a trial judge has discretion to exclude all references to a consent decree. But above all, counsel should remember that a well-prepared case may be effectively destroyed by even a moderately skilled cross-examiner armed with a consent decree.

Changes in the Design of Products. Motions to exclude evidence of changes in a product's design or changes in the "state of the art" which are offered to show that an item is defective are inadmissible in an action based upon strict liability in tort,[177] and evidence of any such change would be sufficiently prejudicial to warrant a pretrial exclusionary motion.

Scientific Evidence. A motion should be made to exclude any highly technical or sophisticated scientific evidence unless (1) it is properly authenticated and its trustworthiness is shown and (2) the party offering it makes sufficient materials available to the opposing party to permit cross-examination. These materials would include several items which the motion should set forth with specificity.[178] First, the backup or source data for the test or evidence being offered should be provided well in advance of trial.[179] Second, a deposition of the witness who prepared the evidence or conducted the test or procedure, and a deposition of the witness who is to present the evidence at trial (if those two witnesses are different) should be requested. Finally, the party should ask for all evidence of (1) the preparation for the test, (2) test results from trials that were run before or after the tests that are to be offered in evidence, and (3) any work preliminary or preparatory to the tests or procedures.[180]

174. Independent Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 179 F. Supp. 489, 490 (S.D.N.Y. 1959); Brownlee v. Malco Theatres, Inc., 99 F. Supp. 312, 317 (W.D. Ark. 1951).

175. Rule 403 provides that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice," and Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

176. [1977-2] Trade Cas. ¶ 61,603 (9th Cir. 1977).

177. *See* LaMonica v. Outboard Marine Corp., 48 Ohio App. 2d 43, 44, 355 N.E.2d 533 (1976), and cases cited therein; Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974). [Eds. note: *But see* Note, Chart v. General Motors: *Did It Chart the Way for the Admission of Evidence of Subsequent Remedial Measures in Products Liability Actions?*, 41 OHIO ST. L.J. 211 (1980).]

178. A motion of this type could be supported by cases such as United States v. Stifel, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (if the government uses highly sophisticated scientific evidence, neutron activation analysis, it must allow time for the defendant to make similar tests).

179. 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 2.71, at 129-32 (2d ed. 1979).

180. *See* Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122, 1134 (S.D. Tex.

It is not possible to assemble an exhaustive list of the motions that would be suited for excluding or limiting the use of evidence of this type. However, any list would certainly include motions to exclude evidence of subsequent remedial measures offered to prove negligence or culpable conduct;[181] to conduct a hearing out of the jury's presence in order to determine if the contents of a chart or summary is adequately supported by the proof;[182] a motion to exclude tape recordings[183] that contain a party's conversation before the litigation and are likely to be given unjustified weight by the jury;[184] or a motion to exclude computer evidence that is not supported by the necessary foundation[185] or authentication.[186]

1976) (permitting discovery of computer and economic experts' highly technical developmental work for "a highly sophisticated and computerized econometric model," that was to be used to simulate market conditions).

181. FED. R. EVID. 407; Annot., 64 A.L.R.2d 1296 (1959).

182. In United States v. Bartone, 400 F.2d 459, 461 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969), the Sixth Circuit encouraged trial courts to conduct hearings out of the jury's presence "in order to determine that everything contained in the summary is supported by the proof." More recently, in United States v. Collins, 596 F.2d 166, 169 (6th Cir. 1979), the court stated that "such proceedings are not invariably required, especially when, as in this case, the summaries are straightforward and their basis in the evidence clear." Since well-prepared charts can give a deceptive appearance of completeness, a short hearing out of the jury's presence, at which the opposing counsel cross-examines or voir dires the person (usually an expert) who prepared the chart, would often be appropriate and would not cause a serious loss of judicial time.

183. Numerous cases have considered the necessary foundation for introduction of electronic recordings. *See* United States v. Starks, 515 F.2d 112, 121 n.11 (3d Cir. 1975); United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); United States v. Skillman, 442 F.2d 542, 552 n.8 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971); United States v. Lipowski, 423 F. Supp. 864, 868 (D.N.J. 1976); State v. James, 41 Ohio App. 2d 248, 250, 325 N.E.2d 267, 269 (1974) ("A mechanical record, if audible or legible, and not tampered with, is likely to be much more accurate and dependable than oral testimony."). Various precautions, such as examination by an expert to see that the tape has not been altered and providing the jury with a written transcript of the conversation approved by both parties, can reduce the likelihood of error. A motion to exclude tape recordings unless these precautions are taken should result in the court ordering the precautions and giving the jury a cautionary instruction.

184. *See* United States v. Haldeman, 559 F.2d 31, 54 n.15 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), which prescribed the manner of handling excerpts of taped conversations for a jury. In that case tape recordings of conversations of co-conspirators were not admitted into evidence, but the

> transcripts were carefully checked by the trial judge and, once he ruled they were "substantially accurate," they were then given to the jury to serve as listening aids while the jury heard the tapes through head phones. The transcripts themselves were not admitted into evidence, and the jury was repeatedly told that their own interpretation of what they heard on the tapes was to control.

See also United States v. Gorel, 602 F.2d 734, 739 (5th Cir. 1979); United States v. Vinson, 606 F.2d 149, 155 (6th Cir. 1979); United States v. Nickerson, 606 F.2d 156, 158 (6th Cir. 1979).

185. The required foundation usually consists of a showing by the person offering the computer evidence that (1) the entries were made in the ordinary course of business, or were made from "hard copy" records which themselves were made in the ordinary course of business; (2) the machine or equipment is accurate; (3) those who supply the information or run the machine or equipment were trained so that the information put into the machine or equipment was accurate; and (4) certain precautions were taken to prevent errors. See the excellent concurring opinion of Judge Ely in United States v. de Georgia, 420 F.2d 889, 894 (9th Cir. 1969), a case which held that testimony that an automobile rental company's computer showed that no transaction involving the allegedly stolen automobile had been recorded at the relevant times as admissible under the Federal Business Records Act, 28 U.S.C. § 1732. *See also* Schiavone-Chase Corp. v. United States, 553 F.2d 658, 666 (Ct. Cl. 1977) (affirming the trial court's admission of a party's "computer billing lists contained in its own books and records," based on testimony "that these computer billing lists were prepared from original 'hard copy' documents," even though the hard copy documents had been destroyed); United States v. Liebert, 519 F.2d 542, 547-48 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975) (dealing with Internal Revenue

Admissibility of surveys or polls may be challenged both under the hearsay rule and because the survey or poll contains leading questions, contains self-serving statements, or was prepared with poor techniques.[187] The *Manual for Complex Litigation* states that "it is desirable that questions going to the admissibility of the polls or samples be raised and, if possible, decided prior to the time they are offered in evidence."[188]

A good outline of the procedure for attacking survey evidence on non-hearsay grounds is provided in *Ways & Means, Inc. v. IVAC Corp.*[189] In that case the court denied the plaintiff's motion for a pretrial ruling on the admissibility of a damage study, focusing on Federal Rule of Evidence 703:

> The modern trend appears to be to examine the admissibility of survey

Service printouts indicating that the IRS had no record of having received the defendant's federal income tax returns); United States v. Russo, 480 F.2d 1228, 1241 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974) (computer printout of insurance company's annual statistical run held properly admitted); United States v. Dioguardi, 428 F.2d 1033, 1037-39 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970) (concerning a computer program by which a prosecution witness had instructed a computer to prepare figures showing when various items of a bankrupt's inventory were exhausted, and holding that effective cross-examination of such a witness requires that the prosecution make available before trial materials needed for cross-examination such as computer programs and the flow charts used in preparation of computer programs); Ed Guth Realty, Inc. v. Gingold, 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E.2d 441 (1974) (holding that statistical evidence backing up real property equalization rates stored as computer printouts could be introduced in evidence under the business entry rule and also under the voluminous writings exception to the best evidence rule). *See generally* Annot., 71 A.L.R.3d 232 (1976); Annot., 11 A.L.R.3d 1377 (1967); Note, *A Reconsideration of the Admissibility of Computer-Generated Evidence*, 126 U. PA. L. REV. 425 (1977); Note, *Appropriate Foundation Requirements for Admitting Computer Printouts Into Evidence*, 1977 WASH. U.L.Q. 59; Younger, *Computer Printouts in Evidence: Ten Objections and How to Overcome Them*, 2 LITIGATION 28 (1975); Roberts, *A Practitioner's Primer on Computer-Generated Evidence*, 41 U. CHI. L. REV. 254 (1974).

186. FED. R. EVID. 901, 902 can be of considerable help in authenticating documents without detailed foundation testimony at trial. FED. R. EVID. 901(b)(7) provides that public records or reports can be authenticated by evidence that the report "or data compilation, *in any form*, is from the public office where items of this nature are kept (emphasis added)." Computer evidence can also be authenticated under FED. R. EVID. 901(b)(9), dealing with authentication of a process or system: "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." In addition, public records that are also data compilations can be authenticated under FED. R. EVID. 902(4) which provides that certified copies of public records, including "data compilations in any form," are self-authenticating. Numerous types of summaries kept by governmental agencies may therefore be authenticated by presenting them with a seal or certification.

Judicial notice under FED. R. EVID. 201 is another quick way to avoid consumption of trial time with these matters, and the party offering scientific or technical evidence may well wish to file a written motion asking the court to take judicial notice of the relevant facts underlying the testimony or evidence and the accuracy of the equipment or procedure involved. As to judicial notice in complex cases, see Ames, *Evidentiary Aspects of Relevant Product Market Proof in Monopolization Cases*, 26 DE PAUL L. REV. 530, 544 n.67 (1977).

187. *See, e.g.*, Pittsburgh Press Club v. United States, 579 F.2d 751, 759 n.16 (3d Cir. 1978), reversing and remanding an income tax refund action in which a survey of affairs of a previously tax-exempt press club was held to be inadmissible hearsay. The survey at issue in *Pittsburgh Press Club* was not objective, scientific, or impartial. The court held that the district court's findings, which were all premised on the inadmissible survey, were not supported by the record and were thus clearly erroneous. This case contains a good collection of the authorities concerning the admissibility of survey and poll evidence. *See also* Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 519-20 (10th Cir. 1976) (upholding admission of questionnaires completed by customers of an automobile dealer after the litigation began).

188. 1 MOORE'S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION pt. 2, ¶ 2.71, at 127 (2d ed. 1979). *See also id.* ¶ 3.50.

189. [1979-2] Trade Cas. ¶ 62,734 (N.D. Calif. 1979).

evidence without regard to traditional hearsay analysis, relying instead upon the two principal factors suggested by Rule 703: (1) whether or not there is some *necessity* that makes the survey desirable; and (2) whether or not the survey itself is trustworthy.[190]

As a general rule, counsel should move to exclude any evidence that creates "the delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it."[191] Depositions of an opponent's experts and examination of an opponent's trial exhibits should quickly reveal such evidence.

B. *Procedures for Instructing the Jury*

How should counsel educate the jury to his case? There is an increasing tendency for courts to permit jurors to participate in the trial proceedings to follow more closely and to understand the evidence. Jurors can take copies of the jury instructions and the exhibits into the jury room during deliberations,[192] take notes,[193] ask questions, and hold personal copies of exhibits during questioning of each witness. A short motion can be filed asking the court to permit any of these steps.

Another method for a juror to follow and understand the evidence is to see the subject of the action or the site of the events leading to the action. A motion for an order permitting the jury or the court[194] to view the subject or scene of the action or some other place has several advantages in complex civil actions. First, it permits the jury to obtain a better understanding of the case.[195] Second, it can enliven the presentation of a commercial case that otherwise involves proof that is dull or technical. Third, it can be used to deal a deadly blow to certain types of claims or

190. *Id.* at 78,143 (emphasis in original).

191. Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 912 (2d Cir. 1962).

192. "It is frequently desirable that instructions which have been reduced to writing be not only read to the jury, but also handed to the jury." McDaniel v. United States, 343 F.2d 785, 789 (5th Cir.), *cert. denied*, 382 U.S. 826 (1965). Giving a written copy of the instructions to the jury is not error. Haupt v. United States, 330 U.S. 631, 643 (1947) (allowing jury to have a typewritten copy of charge was not error); United States v. Blane, 375 F.2d 249, 255 (6th Cir.), *cert. denied*, 389 U.S. 835 (1967). In contrast to the jury instructions, the pleadings are not to be provided to the jury. McGowan v. Gillenwater, 429 F.2d 586, 587 (4th Cir. 1970).

193. United States v. Johnson, 584 F.2d 148, 157-158 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 1239 (1979); Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 981 n.453 (1959).

194. A view by a judge is quicker, logistically simpler, and probably more beneficial to the trier of fact (since a judge can ask questions) than a view by a jury. For the benefits of such a view in a complex case, see the description of the trial judge's visit to a packaging show in the case of United States v. E. I. Du Pont De Nemours & Co., 351 U.S. 377 (1956), a famous antitrust case in which the issue was whether flexible wrapping materials should be included with cellophane in the relevant product market, *reprinted in* Ames, *Evidentiary Aspects of Relevant Product Market Proof in Monopolization Cases*, 26 DE PAUL L. REV. 530, 546 (1977).

195. In W. M. & A. Transit Co. v. Radecka, 302 F.2d 921, 925 (D.C. Cir. 1962), the jurors literally put themselves in the plaintiff's position. *Radecka* was an action by a bus passenger against a bus company for injuries sustained when the plaintiff passenger was thrown from a seat when the bus suddenly stopped. The court held that the trial court properly permitted the jury to examine the bus and "sit in the seat [in which the plaintiff passenger had sat] and formulate their own conclusions."

defenses, such as the defense that it was easy for the plaintiff to inspect, test, or check the equipment or goods or facility purchased under the contract. A view may also be relevant to damages.[196]

Several points should be made when requesting a view. The trial judge will want to know[197] and should be told (1) what information the view will provide, and especially what information cannot be provided by other proof in the case; (2) the location of the subject or premises to be viewed and its distance from the courtroom; (3) the expense, time, and method of transportation entailed in the view;[198] (4) whether the conditions or the premises or subject have significantly changed or have been materially altered since the events giving rise to the litigation;[199] and (5) what the jury should be told about the view and its purpose.[200]

The jury should be told about the purpose of the view and how it is to be conducted. A suggested instruction should be included in the written memorandum in support of the motion, so opposing counsel will have a chance to review it and discuss it with the court. The trial judge will then feel more confident in giving the instruction to the jury and conducting the view.

Although the view is traditionally conducted very early in a case, it is the better practice to delay the view until at least some of the witnesses have testified. Jurors learn and retain less through an early view[201] since an early

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196. A view of a construction site was approved in Leo Spear Construction Co. v. Fidelity & Cas. Co. of New York, 446 F.2d 439, 444 (2d Cir. 1971), an action by a subcontractor against a general contractor's surety in which the general contractor had allegedly defaulted. The court of appeals held that the trial court's examination of the site of the work was proper, and that the court correctly allowed "the inspection of the site to influence its determination of value" of labor and materials on the job.

197. "The propriety of sending the jurors to view the property was a question that lay within the sound discretion of the district judge." Gunther v. E.I. duPont de Nemours & Co., 255 F.2d 710, 716 (4th Cir. 1958). *Accord*, Northwestern Nat'l Cas. Co. v. Global Moving & Storage, Inc., 533 F.2d 320, 323 (6th Cir. 1976).

198. The motion should state that the moving party has arranged a bus from the ABC Transit Company to take the court, jury, and counsel to the scene and return them to the courtroom. The motion is more likely to be granted if the trial judge does not have to concern himself with the logistics of the view.

199. Martin v. Gulf States Utils. Co., 344 F.2d 34, 37 (5th Cir. 1965), held that there was no error in permitting a jury to view the scene of an accident that ocurred when an apprentice electrician attempted to move an uninsulated service cable attached to the defendant's utility pole, even though the appearance of the scene had been substantially altered since the accident by the trimming of trees. *Accord*, Northwestern Nat'l Cas. Co. v. Global Moving & Storage, Inc., 533 F.2d 320, 323 (6th Cir. 1976).

200. Along with the authority for the view, the court will be assisted by a proposed cautionary instruction to be given to the jury before the view. An example of such an instruction is reproduced in Culpepper v. Neff, 204 Va. 800, 804-06, 134 S.E.2d 315, 318-20 (1964), and in Virginia Jury Instructions § 7.06 (Supp. 1979).

201. In Lynchburg Foundry Co. v. Daniel Int'l Corp., No. 76-0046 (L) (W.D. Va. May 4, 1976), a breach of contract action, the author requested and received a jury view of a foundry where a complicated conveyor system (the underlying product) had collapsed. The view was conducted immediately after opening statements, before any testimony was presented. After the trial was completed, the jurors stated, without exception, that the view would have been much more helpful if it had been conducted later in the trial, since they would have then known which details were important and how the installation and operation of the conveyor related to the case.

view requires the jurors to see the premises or subject before they understand the issues in the case, the relevance or importance of the scene to be viewed, the details to which attention should be paid, or the significance that the premises or subject has for the witnesses' testimony. A view should, therefore, be held after the jurors have the benefit not only of opening statements, but also of at least some of the witnesses' testimony that discloses the importance of the subject of the view.

A view can be even more beneficial if the court permits jurors to ask questions during the view and allows the important areas or subjects to be pointed out during the view. However, strict precautions should be taken to prevent any improper comments or actions during the process. Jurors should be allowed to direct their questions only to the trial judge, who then confers with counsel concerning answer to be given. In addition, the questions, conference of court and counsel, and answers should be recorded by a court reporter who is present at the view. Finally, the jurors should be told that the parties' proof may differ with respect to the occurrence or sequence of events, and that the better questions are the "what is that" and "where is this" questions, and not the "what happened" or "who did this" questions.

III. CONCLUSION

The timely filing of written motions before trial and during the first few days of a lengthy trial can do a great deal to structure a complex action in a way that is advantageous to one's client. By carefully analyzing the issues raised in the pleadings, the controlling law,[202] and the nature and order of proof that is likely to be followed, counsel will usually be able to identify areas in which written motions can be utilized to narrow or eliminate an unfavorable part of the opponent's case or highlight a favorable portion of his own. Skillful use of written motions will ensure that the advocate will be trying the case that is most advantageous to his client when he rises to present his opening argument on the first day of trial.

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202. Authority for the various motions that are suggested by this Article may be found in the *Manual for Complex Litigation*, the Federal Rules of Evidence and the Advisory Committee's accompanying notes, the Commerce Clearing House Antitrust and Securities Law Reporters, computerized legal research services, and the Federal Rules of Civil Procedure. Another, more recent publication that may be useful in the ABA ANTITRUST SECTION'S MONOGRAPH NO. 3, EXPEDITING PRETRIALS AND TRIALS OF ANTITRUST CASES (1979). There is also law journal literature that contains ideas for pretrial and trial strategies and methods. *See* notes 1, 33, 75 *supra*.